Supreme Court, U.S.
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No. 96-

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

JOHN W. BILLMYER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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December 18, 1996 *Counsel for Petitioner*

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98 pp

QUESTIONS PRESENTED

1. Whether membership of a person in a conspiracy is established by proof that the alleged coconspirator secretly took part in conduct parallel to, but separate from, the conduct of the other alleged coconspirators to achieve a similar illegal gain for himself without the knowledge or assistance of any of those other alleged coconspirators.

2. Whether the Court of Appeals erred in determining an alleged coconspirator's membership in a conspiracy without according any analytical significance to the fact that cooperating Government witnesses at the hub of the conspiracy who testified at trial could not identify that alleged coconspirator as a member of the conspiracy undoubtedly because he kept his conduct wholly secret from them.

3. Whether, in a prosecution for conspiracy to commit mail fraud wherein the Government can establish venue with only one particular overt act committed by one particular alleged conspirator, the Government must establish that the conspirator is part of the alleged conspiracy by proof by a preponderance of the evidence, rather than by proof beyond a reasonable doubt.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, John W. Billmyer, respectfully requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in this action.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 99 F.3d 1182. The opinions and judgment of the United States District Court

for the District of New Hampshire are unreported. All of the opinions, including the appellate court's unreported denial of Petitioner's Petition for Rehearing and Suggestion for Rehearing En Banc, are reproduced in the Appendix.

JURISDICTION

The opinion of the United States Court of Appeals for the First Circuit was entered on October 15, 1996. A timely petition for rehearing and suggestion for rehearing en banc was denied on November 4, 1996. The Court of Appeals stayed issuance of its mandate pending decision of this Petition for Writ of Certiorari. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. 18 U.S.C. § 371 provides in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

2. Article III, Section 2, Clause 3 of the United States Constitution states:

> The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

3. The Sixth Amendment to the United States Constitution states, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . .

4. Rule 18 of the Federal Rules of Criminal Procedure states:

> Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses and the prompt administration of justice.

STATEMENT OF THE CASE

1. Factual Background

This case arises out of an alleged extensive kickback scheme among the sales executives of American Honda Motor Company ("Honda") and Honda dealers. Petitioner John W. Billmyer ("Billmyer") was employed as a sales executive at Honda from 1970 until his retirement on March 31, 1988. Billmyer began as a district sales representative and was promoted through the Honda ranks, becoming the national sales manager in 1980. He held that position until he became national sales manager for the new Acura division in 1985, a position he held until his retirement.

In 1991, an internal investigation began in Honda relating to alleged kickbacks and payoffs to Honda executives. The investigation was triggered by a district sales representative in Arkansas who provided a Honda vice-president with information regarding payments to S. James Cardiges, the then-national sales manager who had succeeded Billmyer in the position. The investigation led to the discovery of a multitude of alleged improper payments from Honda dealers and prospective Honda dealers to Honda executives, purportedly for favorable treatment in the awarding of new dealerships and the allotment of vehicles.

2. The Indictment

The investigation into the alleged kickback scheme led to the prosecution of multiple Honda executives. On March 11, 1994, a federal grand jury in New Hampshire returned an indictment against Billmyer, Cardiges, Dennis Joselyn (another Honda executive), and David Pedersen and Damien Budnick (two low level Honda sales managers in the New England region). After superseding indictments were returned, Budnick, Pedersen, and Cardiges ultimately entered plea agreements and cooperated with the Government. Cardiges and Pedersen were key Government witnesses at trial.

The Second Superseding Indictment, which contained four counts, charged Billmyer in only one count (Count Two) with conspiracy to commit mail fraud in violation of 18 U.S.C. § 371. Count Two alleged that Billmyer, Cardiges, Joselyn and others conspired to defraud Honda by accepting payments and other valuable consideration from dealers and prospective dealers in exchange for favorable consideration in the awarding of new dealerships and other preferred treatment.[1]

The only link alleged, for venue purposes, between the Count Two conspiracy and the trial district, New

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[1]Count One charged Cardiges and Joselyn with a RICO conspiracy involving three distinct schemes to allegedly receive kickbacks. The three schemes involved three distinct activities: sales training seminars, dealer advertising associations, and the Count II dealer franchise activity. Count Three (conspiracy to commit mail fraud) and Count Four (mail fraud) charged Cardiges and Joselyn with accepting kickbacks from 1989 through 1992 in relation to the alleged sales training seminar scheme.

Hampshire, was the overt act in paragraph 96(p) of the indictment: that in May 1987, Pedersen, then an assistant zone manager, caused an Acura dealership in Nashua, New Hampshire to be awarded to Thomas Bohlander, in return for approximately $18,000 in college tuition payments for Pedersen's son. Indeed, the jury was instructed that this was the only overt act to be considered in determining if venue in New Hampshire was proper. Necessary to a finding that venue was proper, of course, was a finding that both Pedersen and Billmyer were in fact members of the Count Two conspiracy.

3. District Court Proceedings

At trial, the Government presented thirty-five (35) witnesses, including Cardiges, Pedersen, and a host of Honda dealers from around the country. A number of the witnesses, including Cardiges, testified directly to payments made to Billmyer, allegedly in exchange for favorable treatment in the award of dealerships or allotment of vehicles. When asked by the Government to list his Count Two coconspirators, Cardiges named a number of persons, including Billmyer, but did not name Pedersen or any of Pedersen's direct superiors.

Pedersen, on the other hand, did not testify to any direct activity with Billmyer or Cardiges. Pedersen testified that he "knew" of a conspiratorial agreement involving Billmyer and Cardiges as an "unofficial policy" at Honda wherein dealers seeking Honda dealerships would have to pay Billmyer or Cardiges in order to obtain the dealership. Pedersen did not testify, however, that he

joined this agreement. Instead, he testified that he took action parallel to this agreement by accepting payments and improperly accepting interests in dealerships, but at all times kept his activity secret from Billmyer and all of his other superiors at Honda. Pedersen testified that the **only** Honda employee with whom he shared knowledge of his illegal activities was his subordinate in the New England zone, Budnick. Specifically, with respect to the overt act required for venue in New Hampshire for the Count Two conspiracy, Pedersen testified that he kept his activity with respect to the Nashua dealership secret from all of his superiors at Honda, including Billmyer.

In the end, the jury was left with two facts from which it was asked to infer that Billmyer and Pedersen were members of the same conspiracy: (1) Billmyer and Pedersen were both employed by Honda at the time of their allegedly extortionate conduct, and (2) both Billmyer and Pedersen accepted bribes and gifts from dealers. After seven days of deliberation, the jury returned a verdict of guilty as to Billmyer on Count Two.

The District Court denied Billmyer's Motions for Judgment of Acquittal at the close of the Government's evidence, at the close of Joselyn's evidence (Billmyer presented no evidence, preserving review of his Rule 29(a) motion under First Circuit law), and after the jury verdict. With little discussion, the District Court found that the evidence, "viewed as a seamless whole and taken in a light most favorable to the Government," supported a finding, for the purposes of venue, that Pedersen was a

member of the same conspiracy as Billmyer by a preponderance of the evidence.

4. The First Circuit's Ruling

Billmyer appealed, and the First Circuit affirmed. First, the First Circuit agreed with the District Court in holding that the Government, to establish venue for the Count Two conspiracy, need only prove by a preponderance of the evidence that both Pedersen and Billmyer were members of the Count Two conspiracy. The court rejected Billmyer's contention that the members of the Count Two conspiracy must be proven beyond a reasonable doubt, and that the Government must then prove by a preponderance that one of those conspirators committed an overt act in furtherance of the conspiracy in the trial district.

Second, the court found that there was sufficient evidence to support a finding, by a preponderance, that Pedersen and Billmyer were members of the same conspiracy. Finding that Pedersen followed the "unwritten policy" at Honda of receiving cash and other gifts from dealers and that therefore Pedersen pursued a "common goal" with Billmyer and Cardiges of "accepting illicit consideration for awarding new dealership franchises," the court refused to question the finding that Pedersen and Billmyer were members of the same conspiracy. In so concluding, the court purported to rely upon prior First Circuit precedent, but did nothing to distinguish the substantial authority cited by Billmyer from the Supreme Court and Courts of Appeal indicating that such evidence

is insufficient, without more, to support the finding of a single conspiracy.

REASONS FOR GRANTING THE WRIT

The conflict created by the First Circuit's decision has important consequences. In loosening the requirements for inclusion of a person in a conspiracy, the First Circuit advanced interests common to our contemporary focus on the "war on crime." Society's legitimate concern with crime, however, cannot result in the abandonment of the basic principles underlying guilt and innocence and the basic constitutional protections afforded criminal defendants. Indeed, commentators have noted that in recent years the requirements for finding one to be a member of a criminal conspiracy have been measurable loosened. See Paul Marcus, Criminal Conspiracy Law: Time to Turn Back from an Ever Expanding, Ever More Troubling Area, 1 Wm. & Mary Bill of Rts. J. 1 (1992).

Some courts have also noticed this gradual yet undeniable erosion of the requirements for finding membership in a conspiracy. For example, the Tenth Circuit in United States v. Evans, 970 F.2d 663 (10th Cir. 1992), noted:

> Brice's erroneous conviction serves as a reminder that we must be particularly vigilant when the government seeks to bring many individuals under the umbrella of a single conspiracy. The risk is that a jury

> will be so overwhelmed with evidence of wrongdoing by other alleged coconspirators that it will fail to differentiate among particular defendants. The government must not be allowed to use conspiracy as a tool to circumvent the fundamental principle that "[g]uilt with us remains individual and personal. . . . It is not a matter of mass application."

970 F.2d at 674 (citations omitted). Similarly, the Seventh Circuit in United States v. Townsend, 924 F.2d 1385, 1416 (7th Cir. 1991), stated:

> Learned Hand described the conspiracy charge as the "darling of the modern prosecutor's nursery." Its attraction has not diminished with the passage of years; nor, consequently, has the need for courts to harken back to the basic principles underlying conspiracy liability when reviewing closely the evidence supporting such charges.

The frequency with which the Government invokes the conspiracy statute underscores the importance for uniformity in its application throughout the country. See Ransom v. United States, 434 U.S. 908, 98 S. Ct. 310, 54 L. Ed. 2d 196 (1977) (White, J., dissenting) (conflict should be resolved since the "national criminal code should not be differently interpreted in different courts; some individual should not be punished for conduct for

which others would go free"). Review of this case presents this Court with the opportunity to clearly delineate the evidentiary criteria used to establish membership in a conspiracy and an opportunity to reestablish the basic concepts of "common goal" and "interdependence" necessary to a finding that two persons are coconspirators.

In addition, this case is a particularly appropriate vehicle for review of conspiracy analysis. The First Circuit's holding is plainly at odds with the prior decisions of this Court and other circuits, and this case presents the Court with the evidentiary scenario necessary to clarify what has become a murky area of the law: an example of parallel but unconnected conduct used as a basis for a finding of a single conspiracy. Review of this case will prevent further erosion of the foundations of conspiracy law and provide uniformity in its application throughout the country.

I.

THE FIRST CIRCUIT'S ANALYSIS REGARDING MEMBERSHIP IN A CONSPIRACY SQUARELY CONFLICTS IN PRINCIPLE WITH PRIOR DECISIONS OF THIS COURT AND OTHER CIRCUITS

Although the facts underlying a criminal conspiracy necessarily differ from case to case, the First Circuit's holding and legal analysis used to reach the conclusion that a single conspiracy existed in the case at bar squarely

conflicts in principle with prior holdings of this Court and other Courts of Appeal. The First Circuit has established a precedent that allows use of the conspiracy statute in virtually limitless circumstances, and invites other courts to rely upon its expansive reasoning to loosen the time-honored requirements for a finding of a single conspiracy.

The First Circuit's holding effectively eviscerates two analytical factors key to the conspiracy analysis of this Court and other Circuits: common goal and interdependence. Initially, the First Circuit's holding conflicts with prior decisions of this Court as to what constitutes a "common goal" for conspiracy analysis. In Kotteakos v. United States, 328 U.S. 750, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946), this Court discussed the "common goal" requirement in the context of a wheel conspiracy similar to that alleged in this case. The "hub" of the wheel conspiracy in Kotteakos, Simon Brown, procured loans from the Federal Housing Authority for each of the thirteen alleged coconspirators, using false information on the applications. Brown acted as broker for each of the thirteen defendants in procuring the loans, and no connection was shown between any of the defendants other than their relationship with Brown in procuring the federal loans. This court held that, given these facts, the evidence could not support a finding that each of the thirteen alleged coconspirators pursued a common goal:

> The trial court was of the view that one conspiracy was made out by showing that each defendant was linked to Brown in one or more transactions, and that it was

> possible on the evidence for the jury to conclude that all were in a common adventure because of this fact and the similarity of purpose presented in the various applications for loans.
>
> This view . . . obviously confuses the common purpose of a single enterprise with the several, though similar, purposes of numerous separate adventures of like character.

328 U.S. at 768-69, 66 S. Ct. at 1249-50. Common goal, under the Kotteakos analysis, requires more than similar and parallel but unconnected conduct for the purpose of receiving a similar financial benefit. See also Blumenthal v. United States, 332 U.S. 539, 558, 68 S. Ct. 248, 257, 92 L. Ed. 154 (1947) (noting that no common goal can exist where each illegal transaction is "an end in itself, separate from all others, although all were alike in having similar illegal objects").

Yet the First Circuit's holding significantly broadens what can constitute "common goal" to the point of allowing proof of parallel but unconnected conduct as satisfying the requirement. The First Circuit found that Billmyer and Pedersen shared a common goal "to defraud Honda by accepting illicit consideration for awarding new dealership franchises." To support this conclusion, the First Circuit listed specific evidence indicating that Billmyer had received payments from various dealers, and evidence that Pedersen had received payoffs from some of

these same dealers at other times. There was no evidence, however, of any joint conduct between Billmyer and Pedersen, of any communication between Billmyer or Pedersen, or even of Billmyer's awareness of the existence of Pedersen. Consequently, the import of the First Circuit's holding is plain: parallel but unconnected conduct to achieve a similar illegal end constitutes "common goal" for the purposes of conspiracy analysis. This conclusion squarely conflicts with this Court's holding in Kotteakos and overgeneralizes "common goal" to the point of effectively eliminating it as an analytical factor.

This conclusion also creates a direct conflict among the circuits as to what can constitute "common goal." The Eighth Circuit, in United States v. Rosnow, 977 F.2d 399 (8th Cir. 1992), adopted a "common goal" analysis like that of this Court in Kotteakos. In Rosnow, the defendants were charged with, and convicted of, a single conspiracy wherein the defendants filed fraudulent income tax reports on certain judges and law enforcement officials associated with repossessing the defendants' property. The Government alleged that the defendants "shared the common goal of harassing their perceived enemies through the use of fraudulent claims to the IRS." Id. at 404. The evidence at trial indicated a loose confederation among the defendants, including proof that one of the alleged conspirators had published a book used by others in the scheme, use of only two typewriters to create all of the fraudulent documents, documents listing names of several of the alleged conspirators, discussion among some defendants about the filing of IRS forms, and evidence that several of the defendants functioned as notaries for

the others. Id. at 404-05. The Eighth Circuit concluded, however, that this evidence was insufficient to establish that the alleged conspirators shared a common goal, and consequently all of the defendants were not coconspirators:

> There is no evidence that the defendants were motivated by the common purpose of a single enterprise. They engaged in similar acts for similar reasons. Some were assisted by the same people. Some knew each other. But the evidence fails to indicate that there was mutual assistance or dependence between most of these defendants. It appears that they engaged in these actions in order to benefit themselves individually, to gain revenge on their individual perceived enemies, and not to benefit the success of the other defendants, and for the most part they did not assist the other defendants.

Id. at 406 (citations and quotations omitted). The Eighth Circuit found that parallel but unconnected conduct, engaged in to accomplish a similar illegal end, does not constitute "common goal" for conspiracy analysis, and cannot support the finding of a single conspiracy. This conclusion conflicts squarely with the holding of the First Circuit in the case at bar.

The First Circuit's holding as to what can constitute "interdependence" also clashes with the holdings of other

circuits. Courts generally hold that a single conspiracy cannot exist without a finding of interdependence among each of the alleged conspirators. In the case at bar, the First Circuit mentioned the word "interdependent" once in its opinion and found the requirement met by concluding that the evidence was sufficient to support a finding that, at various times, both Billmyer and Pedersen received payments from a common group of dealers. In plain terms, the First Circuit found that a single conspiracy existed because Billmyer and Pedersen were mutually dependent upon the same class of victims.

This holding, however, considerably broadens the definition of interdependence and directly conflicts with the law of other circuits, which requires more than mere proof of a mutually dependent class of victims, but rather proof of dependence by each conspirator on the other's success. For example, the Tenth Circuit, in United States v. Evans, 970 F.2d 663, 670-71 (10th Cir. 1992), defined the interdependence requirement as requiring proof that each conspirator's actions "facilitate the endeavors of other alleged coconspirators or facilitate the venture as a whole" and proof that each conspirator "intended to act together for their shared mutual benefit." Similarly, a different panel of the Tenth Circuit defined interdependence as existing where "each co-conspirator's activities constituted essential and integral steps toward the realization of a common, illicit goal." United States v. Edwards, 69 F.3d 419, 431 (10th Cir. 1995).

Each of these definitions of interdependence focuses on the mutual dependence among each

conspirator on the activities of the other. The First Circuit's decision in the case at bar, on the other hand, measurably relaxes this standard by allowing proof of interdependence merely upon establishment of dependence upon a mutual class of victims, rather than dependence upon the activities of each conspirator. Indeed, there was no evidence that Billmyer relied in any way upon the activity of Pedersen, and Pedersen testified that he kept his activity secret from everyone at Honda except his subordinate Budnick. A finding of interdependence under these circumstances clashes directly with the Tenth Circuit's holdings in Evans and Edwards. The First Circuit failed to discuss the interdependence requirement in any meaningful way, and its measurable loosening of the interdependence requirement is at odds with the established conspiracy law of other circuits.

II.

THE FIRST CIRCUIT'S FAILURE TO ACCORD ANY SIGNIFICANCE TO THE FAILURE OF A TESTIFYING HUB CONSPIRATOR TO IDENTIFY A PERSON AS A COCONSPIRATOR CONFLICTS WITH THE PRIOR DECISIONS OF THIS COURT

The First Circuit's decision also conflicts with the law of this Court on another issue vital to conspiracy analysis: the significance of the failure of a testifying hub conspirator to identify a person as a coconspirator. One of the two alleged hubs of the conspiracy in the case at bar, Cardiges (Billmyer was the other, and he did not

testify), was asked by the Government to list his coconspirators in the Count Two conspiracy. Cardiges listed a number of individuals, including Billmyer, but failed to mention Pedersen. Despite this being a point of emphasis in Billmyer's appeal, the First Circuit did not even mention this fact in its opinion. This omission, which was left uncorrected by the denial of rehearing, leads to only one conclusion: the First Circuit considered the factor irrelevant to the conspiracy analysis.

This Court has previously held that the failure of a key conspirator to identify a person as a coconspirator "diminished, if not destroyed" any inference that the alleged coconspirator was a member of the conspiracy. United States v. Di Re, 332 U.S. 581, 594, 68 S. Ct. 222, 228, 92 L. Ed. 210 (1948). Indeed, it is hornbook law that although a conspirator need not know the identity of each of his coconspirators, he must at least know of their existence. See, e.g., United States v. Shorter, 54 F.3d 1248, 1255 (7th Cir.) ("all that is required is that a participant know of the others' existence"), cert. denied, 116 S. Ct. 250, 133 L. Ed. 2d 176 (1995).

Yet the First Circuit's decision completely ignores and discards this analytical factor, basing its finding of a single conspiracy upon evidence of common employment and common victims alone. This approach even conflicts with earlier decisions of the First Circuit. In United States v. DeLutis, 722 F.2d 902, 907 (1st Cir. 1983), the First Circuit noted that the failure of a cooperating conspirator, when testifying, to identify a third party as a coconspirator is "exculpatory evidence of considerable

probative force that indicates that [the third party] was not a part of the conspiracy." In the case at bar, the First Circuit disregarded this earlier precedent entirely in addressing the issue of membership in a conspiracy.

III.

THE FIRST CIRCUIT'S HOLDING REGARDING THE BURDEN OF PROOF NECESSITATES REVIEW

The First Circuit's holding regarding the burden of proof necessary for finding Pedersen's inclusion in the Count Two conspiracy for the purposes of venue is also worthy of review. The First Circuit held that, for the purposes of venue analysis, Pedersen need only be found to be a member of the same conspiracy as Billmyer by a preponderance of the evidence, and, for the purposes of guilt, Billmyer need only be found to have conspired with one other person (who need not be Pedersen) by proof beyond a reasonable doubt. In so holding, the First Circuit rejected Billmyer's contention that the members of the Count Two conspiracy must first be established by proof beyond a reasonable doubt, and that the jury must then find, by a preponderance, that one of these conspirators committed an overt act in furtherance of the conspiracy in the trial district.

This dual standard of proof, allowing a defendant to be found guilty of conspiracy without being found, by proof beyond a reasonable doubt, to be a coconspirator with the one person providing venue for the trial, also finds support in the Second Circuit. See United States v.

Rosa, 17 F.3d 1531, 1542 (2d Cir. 1994). Billmyer submits that this dual standard proof, as applied to finding the membership of a conspiracy in determining venue for the conspiracy, is an issue worthy of review.

Venue is constitutionally protected and regarded as a "deep issue[] of public policy" bearing on "the fair administration of criminal justice and public confidence in it." United States v. Johnson, 323 U.S. 273, 276, 65 S. Ct. 249, 250, 89 L. Ed. 236 (1944). Nonetheless, venue generally need only be proven by the Government by a preponderance of the evidence. See, e.g., United States v. Winship, 724 F.2d 1116, 1124 (5th Cir. 1984). The First Circuit in the case at bar, and the Second Circuit in Rosa, both held that the venue analysis must be conducted separate from the guilt analysis, and that is it possible for venue to be proper based upon a finding, by a preponderance, that the coconspirator providing venue is part of the conspiracy, while the evidence may not support that inference by proof beyond a reasonable doubt.

Billmyer does not quarrel with the application of the preponderance of the evidence standard in the ordinary venue inquiry. However, in the circumstances at bar, where venue is determined not only by proof of an act but also by inquiry into the membership of the alleged conspiracy, Billmyer submits that the First Circuit's approach allows a defendant to be convicted of a crime by something less than a reasonable doubt standard.

This Court has never addressed the issue of whether this burden of proof approach is proper in

considering a conspiracy charge. Although venue is traditionally considered on a preponderance of the evidence standard, in the context of a conspiracy charge, the First Circuit's approach allows a criminal defendant to be found guilty of conspiracy without any proof, beyond a reasonable doubt, that the defendant conspired with the one person providing venue for the entire conspiracy.

This issue is worthy of review. In the context of a conspiracy wherein only one alleged conspirator may provide venue for the entire conspiracy, this dual burden of proof approach effectively lessens the Government's burden as a whole, as it allows conviction to be based upon inclusion in the conspiracy of some person other than the one which provides venue. Furthermore, this scenario is likely to commonly occur, as the Government (as it did in the case at bar) brings more multistate conspiracy prosecutions in locales which have little, if any, connection to the activity which is the basis of the charge.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 1996

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APPENDIX

United States Court of Appeals
For the First Circuit

No. 95-2146

UNITED STATES OF AMERICA,
Appellee,

v.

DENNIS JOSLEYN,
Defendant, Appellant.

No. 95-2147

UNITED STATES OF AMERICA,
Appellee,

v.

JOHN W. BILLMYER,
Defendant, Appellant.

APPEALS FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

[Hon. Joseph A. DiClerico, Jr., U.S. District Judge]

Before

Selya, Cyr and Boudin,

Circuit Judges.

David W. Long, with whom Joseph E. Zeszotarski, and Poyner & Spruill, LLP were on brief for appellant Billmyer.

Paul Twomey, with whom Twomey & Sisti Law Offices was on brief for appellant Josleyn.

Michael J. Connolly and Donald A. Feith, Assistant United States Attorneys, with whom Paul M. Gagnon, United States Attorney, was on brief for appellee.

October 15, 1996

CYR, Circuit Judge. A federal jury sitting in New Hampshire returned guilty verdicts against appellants John W. Billmyer and Dennis R. Josleyn for conspiring to defraud their former employer, American Honda Motor Company ("Honda"), by accepting money and other valuable consideration from prospective Honda dealers in exchange for lucrative dealership rights and sundry advantage. See 18 U.S.C. §§ 371 (conspiracy) & 1341 (mail fraud) (1994). Verdicts were returned also against Josleyn for racketeering, conspiracy, and mail fraud, see id. §§ 1962(c), 371 & 1341, relating, inter alia, to kickbacks received in connection with national sales training seminars and dealer advertising programs for Honda dealers. On appeal, Billmyer and Josleyn principally contend that New Hampshire was an improper venue for the franchise conspiracy charge in Count II and that there was insufficient evidence to support the guilty verdicts. We affirm the district court judgments in all respects.

I.
BACKGROUND[1]

Following the second OPEC oil embargo in 1979, American consumer demand for the energy-efficient automobiles manufactured by Honda skyrocketed, and remained strong for a decade thereafter. Just as demand in the United States surged, the Japanese government

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[1]We recite the background facts the jury reasonably could have found, viewing the evidence in the light most favorable to the verdicts. See United States v. Bello-Perez, 977 F.2d 664, 666 (1st Cir. 1992).

imposed export restraints on its carmakers, and Honda was unable to meet the demand for its automobiles in the United States. These uncommonly favorable market conditions endured throughout much of the 1980s, causing enterprising car dealers in the United States to compete fiercely (and sometimes unfairly) for exclusive Honda franchises in anticipation of the extraordinarily large profit margins available on such popular Honda models as the Civic, Prelude, and Accord.

Appellant John Billmyer joined Honda as a district sales representative in 1970, and rose rapidly through all four management levels in its field sales division.[2] By 1977, Billmyer had been appointed regional sales manager for the eastern United States. By 1980, he held the top field sales position at Honda --- national sales manager ---- and soon moved from its New Jersey office to headquarters in California. When Honda launched a line of luxury automobiles in 1985, Billmyer became national sales manager for the new Acura Division as well. He remained the top Honda field sales manager in the United States until he retired on March 31, 1988.

After Billmyer retired, he was succeeded as national sales manager by S. James Cardiges, his closest

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[2]At Honda, district sales managers in the field maintained day-to-day contact with their dealers and reported to their respective zone sales managers. Each zone manager was responsible for Honda sales in several states. Zone managers in turn reported to their respective regional sales managers. The two regional managers each supervised Honda sales in the field for roughly one-half the country.

associate at Honda. Billmyer had hired Cardiges as the Honda sales manager for the Baltimore/Washington D.C. district in 1977, and rapidly promoted him through the ranks: from zone manager for the mid-Atlantic states in 1979, to zone manager for the west coast (the largest and most prestigious zone) in 1981, to regional sales manager for the western United States in late 1982. While western regional sales manager, Cardiges worked closely with Billmyer. The two often traveled to work together and took business trips within the United States and overseas. Finally, Cardiges succeeded Billmyer as national sales manager in 1988. He resigned in April 1992 by "mutual agreement" with Honda, to forfend termination.

Appellant Dennis R. Josleyn joined Honda in January 1983, and followed a similar path: assistant sales manager for the mid-Atlantic zone in 1985; mid-Atlantic zone manager in March 1987; and zone manager for the west coast, resident in California, in early 1991, a position he held until he resigned from Honda in April 1992.

Throughout appellants' tenure with Honda, corporate policy and procedures for awarding new Honda dealerships were set forth in the "Honda Automobile Dealer Appointment Procedures Manual." The first step was to identify a geographic area ripe for a new dealership --- in Honda terminology an "open point" -- through reference to marketing and demographic studies, data relating to competition, and an assortment of other information. Next, the district and zone sales managers for the area under consideration were to "prospect" for a qualified dealer to fill the "open point," then compose a

slate of three or more suitable candidates. Honda policy directed that sales managers evaluate candidates according to their experience in automobile retailing, available capital, personal reputation, and the quality of their location and facilities, all with the ultimate aim that Honda dealerships be awarded to the best candidates.

Honda sales managers at each level, see supra note 2, were required to participate in recommending and approving candidates for any "open point." With the possible exception of Billmyer and Cardiges, in their respective capacities as national sales manager, no sales manager at any level possessed unilateral authority to award a new dealership. Furthermore, approval was required from managers representing the parts, service, and market-representation departments as well.

Once selected for an "open point" dealership, with the approval of sales managers at the district, zone, regional, and national levels, a successful candidate received a "Letter of Intent" ("LOI") from Honda via United States mail, authorizing the prospective dealer to open the new, exclusive dealership upon certain conditions, such as constructing a facility within a specified time. Until the franchise itself was issued to the prospective dealer, however, these LOI rights remained the property of Honda. Like its competitors, Honda exacted no fee for its dealership franchises. Nor were Honda personnel allowed to accept money or other consideration of significant value for assistance in obtaining a Honda franchise.

In addition to Honda policy and procedures governing new dealerships, its "conflict of interest" policy prohibited employees from accepting anything of significant value from a Honda dealer and from acquiring or holding any interest in a Honda or Acura dealership. The "conflict of interest" policy was disseminated among all Honda sales managers, who were required to sign disclosure forms indicating ongoing compliance. Sales managers at every level were duty-bound to ensure that their respective subordinates honored the policy prohibiting conflicts of interest, and report all violations to their senior manager or the Human Resources Department.

Notwithstanding these rigorous internal procedures, however, there were numerous violations of the "conflict of interest" policy. From the late 1970s through the early 1990s, sales managers at every level commonly accepted money and valuable gifts, including Rolex watches, furniture, and business suits, from prospective dealers vying for "open points" or from dealers seeking increased Honda automobile allocations. Yet their illicit activities apparently escaped notice by nonparticipating sales managers and dealers for years.

Finally, in 1991 an internal investigation was triggered by an uninvolved district sales representative in Arkansas who provided a Honda executive vice-president with evidence of payoffs involving Cardiges, then the national sales manager, and a zone manager. By early 1992, Honda had begun "cleaning house" and Cardiges

had resigned. An extensive federal criminal investigation ensued.

On March 11, 1994, a federal grand jury in New Hampshire returned an indictment against Billmyer, Josleyn, Cardiges and two lower-level Honda sales managers responsible for the New England region, David L. Pedersen and Damien C. Budnick.[3] Superseding indictments were returned against Billmyer, Josleyn, and Cardiges in October 1-994 and January 1995. Ultimately, Budnick, Cardiges, and Pedersen entered into plea agreements and cooperated with the government. Cardiges and Pedersen were key government witnesses at trial.

The second superseding indictment charged Josleyn and Cardiges, in Count I, with a pattern of racketeering in violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c) (1994). As Racketeering Act 1, it alleged that Josleyn and Cardiges had persuaded Honda to select a particular outside vendor (from which the defendants had received kickbacks) to conduct sales training seminars for Honda salespeople employed in New Hampshire and elsewhere

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[3]Pedersen had joined Honda in July 1979 as a district sales manager for Maine, New Hampshire, Vermont, and upstate New York. Within a year he was transferred to Minnesota. Around June 1982, he became a district sales manager in northern Ohio; in 1985, a district sales manager in the new Acura Division, responsible for a territory extending from Maine to Minnesota; and, in March 1987, an assistant zone manager, responsible for the area which included New Hampshire. Budnick, a district sales manager also responsible for New Hampshire, reported directly to Pedersen.

in the United States. Racketeering Acts 2 through 8 related to regional advertising associations which pooled monies advanced by individual Honda dealers to defray their local Honda advertising costs. Josleyn and Cardiges were charged with causing Honda to match the contributions made by the Honda dealers to these regional advertising associations, on the condition that the advertising associations hire a particular vendor (controlled by Josleyn's brother) to provide the advertising services. After receiving payments from the regional advertising associations, the vendor allegedly made kickbacks to Josleyn and Cardiges. Other Racketeering Acts described in Count I alleged, inter alia, that Josleyn and Cardiges received kickbacks for awarding numerous LOIs to various dealership candidates in California, Maryland, New York, and other states.

Count II charged Billmyer, Cardiges, and Josleyn with conspiring to defraud Honda by accepting payments and other valuable consideration from dealers and prospective dealers in exchange for LOIs or other preferred treatment. Count III (conspiracy) and Count IV (mail fraud) charged Josleyn and Cardiges with accepting kickbacks from 1989 through 1992, in relation to the sales training seminars. Overall, Josleyn was charged in all four counts, whereas Billmyer was charged with the Count II "dealer franchise" conspiracy only.

Trial began on February 7, 1995, before Chief Judge Joseph A. DiClerico, Jr.[4] After presenting thirty-five witnesses, including Cardiges and Pedersen and many Honda dealers from around the country, the government rested its case on May 10, 1995. Billmyer opted to present no witnesses, while Josleyn mounted a defense based on the theory that top Japanese executives in Honda had condoned the activities alleged in the indictment. At the close of the evidence, the district court denied appellants, renewed Rule 29 motions for judgments of acquittal. See Fed. R. Crim. P. 29(a).

The case went to the jury on May 19. Seven days into the deliberations, guilty verdicts were returned against both Billmyer and Josleyn. After denying their motions for judgments of acquittal, the district court sentenced Billmyer to a five-year prison term and a $125,000 fine; and Josleyn to six and one-half years in prison on Count I and a five-year prison term on each of the three remaining counts, all to be served concurrently.

II

DISCUSSION

A. Joinder of Defendants

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[4]Three weeks into the trial, we were called upon to resolve a discovery dispute. See United States v. Billmyer, 57 F.3d 31 (1st Cir. 1995).

As in the district court, Josleyn and Billmyer contend on appeal that their joint indictment and trial violated Fed. R. Crim. P. 8.[5]

The federal courts have long recognized that consolidated trials tend to promote judicial economy, conserve prosecutorial resources, and foster the consistent resolution of factual disputes common to properly Joined defendants. See, e.g., United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35, 60 (1st Cir. 1991). In resolving a Rule 8(b) misjoinder claim, the trial court must examine the indictment to determine whether there is a factual basis for joining the defendants. United States v. Boylan, 898 F.2d 230, 245 (1st Cir.), cert. denied, 498 U.S. 849 (1990). While Rule 8 harbors the potential for unfair prejudice in consolidated trials, see King v. United States, 355 F.2d 700, 703-04 (1st Cir. 1966) (Aldrich, C.J.)

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[5]Rule 8 provides:

(a) **Joinder of Offenses.** Two or more offenses may be charged in the same indictment or information in a separate count for each offense if the offenses charged, whether felonies or misdemeanors or both, are of the same or similar character or are based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan.

(b) **Joinder of Defendants.** Two or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Fed. R. Crim. P. 8 (emphasis added).

(noting risk that jury may infer guilt by association), the rule nonetheless may be generously construed in favor of joinder, given the protective discretion vested in the trial court under Fed. R. Crim. P. 14.

The district court apparently concluded that the Count II dealer franchise conspiracy charge against Billmyer and Josleyn warranted their joinder under Rule 8(b). Its conclusion plainly would have been unexceptionable had the indictment contained only Count II, see United States v. Morrow, 39 F.3d 1228, 1237-38 (1st Cir. 1994), cert. denied, 115 S. Ct. 1421 (1995), or had the conspiracy alleged in Count II clearly encompassed all substantive offenses alleged in the indictment. See United States v. Arruda, 715 F.2d 671, 678 (1st Cir. 1983). Otherwise, joinder under Rule 8(b) was problematic unless the criminal acts alleged in all counts were part of the same series of acts or transactions. See United States v. Yefsky, 994 F.2d 885, 895 (1st Cir. 1993).

A misjoinder of defendants requires a reversal only if the resulting prejudice "'had substantial and injurious effect or influence in determining the jury's verdict". United States v. Lane, 474 U.S. 438, 449 (1986) (mandating "harmless error" review of Rule 8(b) misjoinder) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). As it would be incumbent upon this court in all events to conduct the "harmless error" analysis mandated in Lane were we to conclude that a misjoinder occurred, see id., and since the misjoinder question itself is far from clear, we will assume, without deciding, that the misjoinder occurred as claimed by Billmyer, and

proceed directly to the "harmless error" inquiry. See United States v. Edgar, 82 F.3d 499, 504 (1st Cir.) (bypassing misjoinder question where any error ultimately would prove harmless), petition for cert. filed, 65 U.S.L.W. 3110 (U.S. July 16, 1996) (No. 96-178). We conclude that any misjoinder was harmless.

Not only did the parties marshal their evidentiary presentations to minimize prejudicial spillover, but throughout the trial the district court prudently and carefully cautioned the jury to consider the evidence against each individual defendant. No less importantly, Billmyer's retirement from Honda, prior to the time Josleyn launched the dealer advertising association and sales training schemes, unquestionably facilitated the individualized factfinding focus to which each defendant was entitled from the jury. Cf. Morrow, 39 F.3d at 1235-36 (erroneous admission of hearsay under coconspirator exception held to be "harmless" given distinctiveness of two fraudulent schemes). Finally, at the close of all the evidence, the trial judge gave a careful cautionary instruction, once again reminding the jury to consider the evidence against each defendant individually. See Lane, 474 U.S. at 450 (limiting instructions mitigate prejudice from misjoinder).

Although these safeguards may not have sufficed in another case, the evidence against both Billmyer and Josleyn can only be described as overwhelming. See Randazzo, 80 F.3d at 628. An army of former Honda executives, including Cardiges, Billmyer's protege and eventual successor, as well as numerous Honda dealers,

presented a wealth of telling evidence against appellants. See Lane, 474 U.S. at 450 (noting overwhelming evidence of guilt); see infra Section II.B.3. Consequently, we are persuaded that no aspect of the jury's decision was substantially influenced by any misjoinder. See O'Neal v. McAninch, 115 S. Ct. 992, 995 (1995).

B. Sufficiency of the Evidence and Venue (Franchise Conspiracy Count)

The jury found that both appellants participated in the dealership franchise conspiracy alleged in Count II.[6] Neither appellant seriously disputes that he conspired with Cardiges. Rather, their principal contention is that there was insufficient evidence to prove, beyond a reasonable doubt, that they both participated in the same conspiracy with Pedersen, which, they maintain, was essential to establish both the substantive conspiracy charge in Count II and proper venue in New Hampshire. As their contention confuses the standards of proof applicable to these two distinct issues, and the record demonstrates that

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[6]Count II alleged that Billmyer, Josleyn, Cardiges, and others known and unknown, conspired to defraud Honda by accepting money and other valuable consideration in exchange for LOI rights and other preferential treatment to various Honda dealers and prospective dealers. only one overt act in furtherance of the franchise conspiracy alleged in Count II took place in the District of New Hampshire. It alleged that David Pedersen, then an assistant zone sales manager responsible for New Hampshire, had recommended one Thomas Bohlander for an Acura dealership in Nashua, New Hampshire, in return for approximately $18,000 in college tuition payments for Pedersen's son.

the government readily met both, appellants' convictions under Count II must be affirmed.

1. Standard of Proof

The unchallenged instructions apprised the jury that the government was required to prove four elements, beyond a reasonable doubt, in order to prevail on Count II: (i) two or more persons entered into the unlawful agreement charged in the indictment; (ii) the particular defendant, knowing the purpose of the agreement, knowingly and willfully became a member of the conspiracy; (iii) some member of the conspiracy knowingly committed at least one alleged overt act; and (iv) at least one overt act was committed in furtherance of the conspiracy. See, e.g., United States v. Sawyer, 85 F.3d 713, 714 (1st Cir. 1996) (citing United States v. Frankhauser, 80 F.3d 641, 653 (1st Cir. 1996)); United States v. Brandon, 17 F.3d 409, 428 (1st Cir.), cert. denied, 115 S. Ct. 80 (1994). Thus, the jury need only have found beyond a reasonable doubt that each appellant conspired with at least one other person (e.g., Cardiges), and not necessarily with Pedersen as well.

Putting aside for the moment the question of guilt, see infra Section II.B.3, it is clear that adequate evidence of Pedersen's role in the dealer franchise conspiracy was essential to establish New Hampshire as a proper venue

for Count II.[7] Without objection, the district court instructed the jury that the government must establish, by a preponderance of the evidence (rather than beyond a reasonable doubt), that Pedersen, Billmyer and Josleyn joined the Count II conspiracy and that Pedersen committed the alleged overt act involving the Acura dealership in Nashua, New Hampshire. See United States v. Cordero, 668 F.2d 32, 45 n.18 (1st Cir. 1981) (applying preponderance standard, as venue is not an element of conspiracy offense); supra note 6. Thus, consistent with the unchallenged jury instructions on conspiracy and venue, as well as applicable law, the government could establish venue in New Hampshire by only a preponderance of the evidence, but it was required to prove each appellant's participation in the conspiracy beyond a reasonable doubt.[8]

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[7]Venue rights are guaranteed by the Constitution, see U.S. Const. art. III, § 2, cl. 3; United States v. Georgacarakos, 988 F.2d 1289, 1293 (1st Cir. 1993), and prescribed by the Federal Rules of Criminal Procedure, see Fed. R. Crim. P. 18 ("Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed."). Venue "concerns only the place where the case may be tried[,]" whereas jurisdiction "has to do with the authority or power of a court to try a case." Wayne R. LaFave & Jerold H. Israel, Criminal Procedure § 16.1, at 334 (1984 & Supp. 1991) (footnotes omitted).

[8]The following explanation exposes the fallacy in the unitary standard of proof urged by appellants.

> [T]he evidence may well be sufficient to permit reasonable inferences that a given individual was more likely than not a member of the alleged conspiracy and performed a given act in furtherance of the conspiracy within the district of

2. Standard of Review

We will uphold the verdicts under Count II if a rational juror could have found each substantive element of the alleged conspiracy beyond a reasonable doubt, United States v. DiMarzo, 80 F.3d 656, 660 (1st Cir.), petition for cert. filed, No. 96-5578 (U.S. Aug. 13, 1996), and proper venue by a preponderance of the evidence, Cordero, 668 F.2d at 45 n.18. All credibility issues are to be resolved, and every reasonable inference drawn, in the light most favorable to the verdict. DiMarzo, 80 F.3d at 660; United States v. Lam Kwong-Wah, 924 F.2d 298, 301 (D.C. Cir. 1991) (venue). A thorough review of the entire record discloses ample evidentiary support for the verdicts against each appellant.

3. Guilt

The Count II conspiracy charge required proof that the particular defendant and at least one other person expressly or tacitly agreed to commit a federal offense. DiMarzo, 80 F.3d at 660. The government must have shown that the defendant voluntarily participated to promote a criminal objective. Brandon, 17 F.3d at 428.

> prosecution, thereby satisfying the venue requirement, even if the jury finds the same evidence not sufficiently persuasive to cause it, for purposes of assessing guilt, to draw those inferences beyond a reasonable doubt.

United States v. Rosa, 17 F.3d 1531, 45 n.18 (2d Cir.) (citation omitted), cert. denied, 115 S. Ct. 211 (1994).

When, as in this case, mail fraud is an alleged goal of the conspiracy, the government must prove either the intent to use the mails or that such use was reasonably foreseeable. Yefsky, 994 F.2d at 890; see also United States v. Dray, 901 F.2d 1132, 1137 (1st Cir.) (noting that intent element in conspiracy differs from substantive mail fraud), cert. denied, 498 U.S. 895 (1990). A particular defendant need not have been familiar with all the details of the conspiracy or with the identities of all other conspirators. United States v. Innamorati, 996 F.2d 456, 470 (1st Cir. 1993), cert. denied, 510 U.S. 1120 (1994); United States v. Bello-Perez, 977 F.2d 664, 668 (1st Cir. 1992).

A brief overview leaves no reasonable doubt that Billmyer, Cardiges, and other Honda sales executives, respectively, conspired to defraud Honda by accepting valuable consideration for awarding dealership franchises and other preferential treatment to Honda dealers and prospective dealers.

a. Billmyer

As early as 1979, while Billmyer was the eastern regional sales manager, Cardiges, as zone manager for the mid-Atlantic states, accepted a $10,000 payment from a Honda dealer in Philadelphia, and split it with Billmyer. In late 1979 or early 1980, Cardiges presented Billmyer with a gold Rolex watch worth as much as $15,000 from a large Honda dealer in the Washington, D.C. area. Beginning with the 1984 holiday season and continuing through 1992, Cardiges received $20,000 to $25,000 each

year from John Rosatti, a Honda dealer in New York City. Rosatti told Cardiges that he was paying Billmyer also, because, as Cardiges testified at trial, like other dealers Rosatti wanted "favorable treatment, wanted more automobiles, more franchises, and wanted the ability to have the ear of the people who were in power at Honda."

Cardiges and Billmyer both helped a dealer named Rick Hendrick acquire approximately thirty Honda and Acura franchises in various states, including Texas, Georgia, and the Carolinas. In return, Hendrick helped Cardiges buy a California residence from which Cardiges later realized a $250,000 gain. Thereafter, Hendrick defrayed approximately $150,000 in interest payments on a loan Cardiges had obtained to buy a $700,000 home in Laguna Hills, California. During this same 1989-92 time frame, Hendrick intimated to Cardiges that he was involved in financing Billmyer's home in Palm Springs as well. Cardiges also learned from Billmyer that Hendrick had provided Billmyer with a top-of-the-line BMW.

Cardiges described periodic payoffs from one Marty Luftgarten, who owned dealerships in New Jersey, Philadelphia, and southern California. For example, at the grand opening of a Luftgarten dealership during the mid-1980s, Billmyer, Cardiges, and two other Honda sales managers, Bill Kutchera and Jeff Conway, gathered in a conference room where Luftgarten handed each an envelope containing $5,000 in cash. Around the holiday season, another dealer customarily sent Cardiges $5,000 gift certificates from Neiman-Marcus for both Cardiges and Billmyer. See Boylan, 898 F.2d at 242 (noting that

defendants often cooperated with one another by collecting payments). The record is replete with other evidence of cash payments from dealers and lavish shopping trips to Hong Kong.

b. Josleyn

Similarly, there was ample evidence to enable a rational jury to find beyond a reasonable doubt that Josleyn conspired with Cardiges and others to defraud Honda in connection with the Honda dealership franchises. In early 1991, while zone manager for the west coast, Josleyn arranged for a "friend" back east, Joe Pope, to pay $150,000 for the "open point" in Elk Grove, California. Josleyn approached Cardiges, national sales manager, and Robert Rivers, regional manager for the western United States, and advised that there would be money in it for all of them if Pope were to receive the Elk Grove dealership. Thereafter, Cardiges, Rivers, and Josleyn, in direct violation of Honda procedure, decided not to prospect for suitable dealership candidates, and awarded the Elk Grove franchise outright to Pope. As promised, Pope issued a $150,000 check payable to Gary & Associates, a company controlled by Josleyn and his brother Gary. Josleyn in turn gave Cardiges and Rivers each $50,000 in cash.

Cardiges testified that Ed Temple, a former Honda zone manager, approached him in the summer of 1991 in behalf of Bob Frink, a dealer interested in the Folsom, California point. Temple had accepted payoffs from dealers while employed by Honda, and after leaving the

company in 1989 established a firm - Blakely Consultants - to facilitate payments to Honda executives from dealers seeking new Honda franchises. Simply put, Temple told Cardiges that Frink was willing to pay Cardiges and Josleyn for the Folsom dealership. On August 5, 1991, Cardiges signed the Folsom LOI, and on the same day Frink paid Blakely Consultants $500,000 for services rendered. Three days later, Temple wrote a $166,666 check to Magnum Marketing, a company owned by Josleyn. Cardiges reported $166,666 from Blakely Consultants on his own 1991 income tax return, although Temple had agreed to hold Cardiges' one-third share until Cardiges left Honda.

We need belabor the point no further, as there was ample evidence to enable the jury reasonably to conclude, beyond a reasonable doubt, that Josleyn was a member of the Count II dealership franchise conspiracy. See Boylan, 898 F.2d at 242.

4. Venue

As a general rule, venue in a conspiracy case depends upon whether an overt act in furtherance of the alleged conspiracy occurred in the trial district. United States v. Uribe, 890 F.2d 554, 558 (1st Cir. 1989); see 18 U. S. C. § 3237(a) (1994). The defendant need not have been physically present in the trial district during the conspiracy. United States v. Santiago, 83 F.3d 20, 24-25 (1st Cir. 1996); see, e.g., Cordero, 668 F.2d at 43-44 (furthering drug importation conspiracy with phone calls to undercover DEA agent in Puerto Rico); cf. United

States v. Georgacarakos, 988 F.2d 1289, 1294 (1st Cir. 1993) (contrasting venue for "group" and "individual" crimes). The government acknowledges that venue was proper in the District of New Hampshire only if there was enough evidence for a rational jury to find it more likely than not that Pedersen, Josleyn and Billmyer belonged to the Count II conspiracy.

Upon joining Honda as a district sales manager in July 1979, see supra notes 2 & 3, Pedersen learned that Honda policy prohibited sales executives from awarding LOIs for personal gain and from accepting gifts valued at more than $25 from dealers. In keeping with Honda policy, Pedersen objected in December 1979 when Bill Lia, a dealer in upstate New York, stuffed an envelope containing cash into Pedersen's pocket. Although Pedersen threatened to report the incident, he relented when Lia told him not to worry because Lia had "already handled the zone." Moreover, Pedersen knew at the time that both his immediate supervisor, Northeast Zone Manager Bill Kutchera, and Billmyer, regional manager for the eastern United States, as well as Cardiges, worked at Honda headquarters in New Jersey. In fact, when Pedersen told Kutchera about the cash bribe tendered by Lia, Kutchera advised Pedersen to ask for a gift certificate in place of the cash. Accordingly, Pedersen ultimately accepted a $300 gift certificate from Lia with Kutchera's explicit approval. Around this same time, Kutchera also told Pedersen that during the course of the previous year he had received two Rolex watches, a cruise, furniture, and other gifts, valued at $13,000, from various dealers.

Pedersen testified that he frequently discussed dealer payoffs with Roger Novelly and Larry Finley, his Honda supervisors in Ohio. Novelly, the assistant zone manager, specifically told Pedersen that Billmyer and Cardiges were being "taken care of" by dealers, and Finley, the zone manager, admitted that Tom Bohlander had paid him for the Honda "open point" dealership franchise in West Cleveland.[9] See, e.g., Boylan, 898 F.2d at 243 (noting that tacit accord among alleged conspirators is permissibly inferred from evidence that defendants "often spoke to their victims about other victims or other defendants in words which plainly revealed that the crimes were interdependent"). Based on this evidence, and there was more, the jury would have been permitted to draw the reasonable inference that Pedersen and his various supervisors over the years had developed a shared understanding of an "unwritten policy" at Honda: dealers had to pay Billmyer and Cardiges, as well as other sales executives in the chain of command, in order to receive a Honda or Acura franchise or other favorable treatment. Id.

John Orsini, a Honda and Acura dealer in Connecticut, provided corroborative testimony at trial, characterizing the kickbacks he had made to Billmyer, Pedersen, and Damien Budnick, Pedersen's subordinate,

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[9]Significantly, Cardiges identified Finley, Novelly, and Kutchera as fellow conspirators. In addition, Pedersen testified that he subsequently received $5,000 from John Rosatti, a New York Honda dealer who admittedly paid both Cardiges and Billmyer. See supra Section II.B.3(a).

as a "way of doing business" with Honda. At Budnick's suggestion, Orsini met with Billmyer in September 1987 to discuss obtaining another Acura dealership. A few weeks later, Billmyer offered Orsini a franchise in Nanuet, New York, if Orsini created a "no-show" job for Billmyer's friend, Douglas T. Richert, at $1,000 per week. After Orsini accepted the Billmyer proposal, he received the Nanuet LOI.

Around the same time, Orsini discussed with Budnick and Pedersen the possibility that Orsini might obtain a new dealership franchise in Salem, New Hampshire. According to Pedersen, Orsini and other dealers routinely and unilaterally mentioned Billmyer's name in conversation, as a means of "impressing" on Pedersen the dealers' established connections with higher-level Honda sales managers. Orsini told Pedersen that he would be willing to pay for the Salem franchise, but not the $50,000 demanded by Budnick. After agreeing to help secure the Salem dealership for Orsini in February 1988, Pedersen received between $2,000 and $4,000 in cash from Orsini. Thus, given the circumstantial evidence that both Billmyer and Pedersen shared a common goal or plan to defraud Honda by accepting illicit consideration for awarding new dealership franchises, the jury reasonably could infer, by a preponderance of the evidence, that Billmyer and Pedersen defrauded Honda in connection with the Salem, New Hampshire LOI by accepting payoffs from a common source, Orsini. See, e.g., Brandon, 17 F.3d at 450 (finding single conspiracy, despite variations in details and tactics,

where main objective, structure, intended victim, and modus operandi remained constant); supra Section I.

In addition to accepting illicit payments from Lia and Orsini, the record demonstrates, by a preponderance of the evidence, that Pedersen committed an overt act in New Hampshire in furtherance of the Count II conspiracy, by accepting a free Acura Integra from Bohlander's West Cleveland, Ohio, dealership in 1986. After Bohlander and Pedersen became friends, Pedersen agreed to help Bohlander acquire more Acura dealerships in exchange for a silent ownership interest in a Nashua, New Hampshire, dealership. Pedersen recommended Bohlander for the new Nashua franchise, and in due course Bohlander received it. Although Pedersen later declined an ownership interest in the Nashua dealership, he nonetheless let Bohlander pay roughly $18,000 in college tuition fees for Pedersen's son. Thus, the evidence sufficed to demonstrate, by a preponderance, that venue was proper in the District of New Hampshire. See Uribe, 890 F.2d at 558.

Finally, there was evidence from which a rational jury reasonably could have inferred, by a preponderance of the evidence, that Bohlander routinely paid Billmyer and Cardiges as well. Pedersen described a card game at Bohlander's Florida condominium in February 1991, during which Bohlander and Lou Tecco, a dealer associated with Marty Luftgarten, talked about paying bribes as a "way of doing business" with Honda, and noted that Billmyer and Cardiges had to be paid in order to get dealerships and other favorable treatment. Along with

the evidence that Bohlander had paid Finley for the West Cleveland dealership and that dealers commonly bribed sales executives at each successive level, see supra p. 22, Pedersen's testimony permitted the jury reasonably to conclude that it was more likely than not that Bohlander had paid Billmyer, the Acura Division head, as well as Pedersen, in return for the Nashua dealership in 1987. Thus, the similarity in the pattern of fraudulent transactions relating to new dealership franchises, the common core of "insider" participants, and the temporal overlap would enable a rational jury reasonably to infer, under the applicable preponderance standard, that Pedersen, Billmyer, Josleyn, and Cardiges agreed, at least tacitly, to defraud Honda by accepting illicit consideration from candidates for new Honda dealership franchises in direct violation of established Honda policy and procedures. See Morrow, 39 F.3d at 1233-34; Bello-Perez, 977 F.2d at 668 (noting that conspirators need not know all co-conspirators); see also United States v. Richerson, 833 F.2d 1147, 1152-54 (5th Cir. 1987).

C. Other Claims By Josleyn

1. Sufficiency of the Evidence (Counts I, III & IV)

After the government rested its case, Josleyn moved for acquittal under Counts I, III, and IV, claiming that the evidence was insufficient to establish, beyond a reasonable doubt, that the Honda dealers and their dealer advertising associations had been victimized by the alleged mail fraud since the dealers and advertising associations

had received the sales training and advertising services for which they paid. This claim fails as well.

In United States v. Allard, 926 F.2d 1237 (1st Cir. 1991), we explained that it is no "defense that the victim received something in exchange even if it was equivalent in value to what the victim was deceived into relinquishing." Id. at 1242 (citing United States v. King, 860 F.2d 54, 55 (2d Cir. 1988), cert. denied, 490 U.S. 1065 (1989)). Given that the proper inquiry under Allard is whether Josleyn intended to defraud the dealers and advertising associations into parting with their money, there was ample evidence, particularly the testimony of Cardiges, to support the jury verdicts against Josleyn under Counts I, III, and IV.

2. Jury Instructions on Condonation

The district court rejected Josleyn's proposed jury instruction that the government must prove, beyond a reasonable doubt, that Honda had not condoned Josleyn's fraudulent activities. Ordinarily, a defendant is entitled to an instruction on his theory of the case as long as it is legally valid and there is sufficient evidence, viewed in the light most favorable to the defendant, to permit a reasonable juror to credit the defendant's theory. United States v. Flores, 968 F.2d 1366, 1368-69 (1st Cir. 1992); United States v. Shenker, 933 F.2d 61, 65 (1st Cir. 1991). The government does not dispute that the evidence adduced at trial would have permitted the jury to find that native Japanese executives at the highest levels of Honda implicitly condoned the acceptance of bribes and

kickbacks. Nevertheless, the trial court need not adopt the precise instructional language proposed by the defendant. United States v. DeStefano, 59 F.3d 1, 3 (1st Cir. 1995)

Viewed as a whole, we think the instruction given by the district court fairly summarized Josleyn's defense theory:

> Since the essential element of the crime charged is intent to defraud, it follows that good faith on the part of the defendant is a complete defense to a charge of mail fraud. A defendant, however has no burden to establish a defense of good faith. The burden is on the government to prove fraudulent intent and the consequent lack of good faith beyond a reasonable doubt.
>
> It is the defendant Josleyn's theory of the case that American Honda knew of and condoned; that is, gave tacit approval to the activities of its employees alleged in the indictment that were in violation of its policies. American Honda's knowledge or condonation of the commission of an offense does not by itself constitute a defense or an excuse. However, any evidence of American Honda's actions or omissions, or evidence of deficiencies in the manner in which it implemented and enforced its policies and procedures, may be considered by you to the extent that such evidence bears on the issue of whether or not Mr. Josleyn formed the required intent to commit the crimes

> with which he is charged. Mr. Josleyn contends that because he believed American Honda knew of and condoned the activities in question, he did not possess the required intent to commit the offenses with which he is charged.
>
> The defendant has no obligation whatsoever to prove to you that his theory is correct, but rather the burden is always on the government to prove all of the material elements of each offense charged beyond a reasonable doubt[,] including the element of intent with respect to each offense [,] as I have already explained to you. (Emphasis added.)

The charge given by the trial judge unmistakably permitted the jury to consider all the condonation evidence in determining whether Josleyn had formed the requisite intent to defraud Honda. No more was required. See generally New England Enters., Inc. v. United States, 400 F.2d 58, 71-72 (1st Cir. 1968) (discussing "good faith" defense to mail fraud), cert. denied, 393 27 U.S. 1036 (1969) . Since Josleyn neither cites authority, nor demonstrates, that any condonation by Honda was relevant to an element of the charged offenses other than intent, see Yefsky, 994 F.2d at 890-91 (listing elements of mail fraud conspiracy and substantive mail fraud) ; see also Aetna Cas. Sur. Co. v. P & B Autobody, 43 F.3d 1546, 1558-60 (1st Cir. 1994) (RICO), we conclude that the jury instruction given by the district court was adequate. See DeStefano 59 F.3d at 3; Shenker, 933 F.2d at 65-66 (rejecting proposed instruction predicated on impermissibly broad defense); cf. United

States v. Wallach, 935 F.2d 445, 464 (2d Cir. 1991) (mail fraud statute protects property interests of shareholders and corporation against officers' schemes).

3. Impeachment of Cardiges

Josleyn contends that though the prosecutor was responsible for deliberately suborning false testimony from Cardiges, the district court unduly impeded Josleyn's efforts to impeach Cardiges on cross-examination. These claims are meritless. See generally United States v. Osorio, 929 F.2d 753, 759-60 (1st Cir. 1991) (approving reasonable restrictions by trial court on repetitive, harassing, unduly prejudicial, irrelevant, or otherwise improper cross-examination); cf. United States v. Tavares, 93 F.3d 10, 14-15 (1st Cir. 1996) (rejecting baseless perjury allegation).

On cross-examination, defense counsel asked Cardiges to explain two newspaper articles in which his lawyer reportedly stated that the government had evidence that the top Japanese managers at Honda knew about the alleged criminal activities in its sales division. Cardiges testified that he neither authorized the press statements, nor knew their basis. On redirect, the prosecutor elicited testimony that though Cardiges and his attorney had been afforded "open access" to the government's file, Cardiges had seen "no documents that either indicated or show[ed] that the Japanese knew anything about kickbacks or gifts or anything like that." In response, Josleyn's counsel sought to confront Cardiges with several FBI interview reports obtained from the

government's file which contained statements by Honda employees to the effect that the Japanese knew about the bribes and kickbacks.

The district court permitted defense counsel to use the FBI reports for impeachment purposes, i.e., to show that Cardiges either did not tell the truth, or had not reviewed the entire contents of the government file. But the court ruled that the FBI interview reports were inadmissible hearsay if offered for their truth. See Innamorati, 996 F.2d at 480-81; Fed. R. Evid. 801(c) (defining hearsay). On appeal, Josleyn argues that the district court impermissibly restricted recross-examination by refusing to allow the jury to consider all hearsay statements in the FBI interview reports.

Our review of the trial transcripts satisfies us that the district court accorded Josleyn ample leeway to explore the FBI interview reports in sufficient detail to enable the jury fairly to weigh Cardiges' testimony relating to the government's file. For example, Cardiges admitted on recross that he had never seen the FBI interview reports, and was "quite sure" that he was not able to get through the "thousands and thousands of documents" during the four-hour period he spent reviewing the government file. The district court did sustain several hearsay objections when defense counsel attempted to delve more deeply into the contents of the FBI interview reports. It did so properly, however, since Josleyn proffered no relevant non-hearsay purpose for probing further. Cf. United States v. Hudson, 970 F.2d 948, 956-57 (1st Cir. 1992) (defense counsel responded to

hearsay objection with impeachment proffer). Nor does Josleyn now challenge these hearsay rulings. Accordingly, we find no error. See Fed. R. Evid. 103(a)(2).

4. Delayed Disclosure of Condonation Evidence

Josleyn claims that he was deprived of a meaningful opportunity to cross-examine Cardiges and other prosecution witnesses due to the government's delayed disclosure of certain letters written to the government by Cecil Proulx, a former Honda executive, outlining his efforts in the late 1980s to bring the pervasive bribes and kickbacks to the attention of Honda's top Japanese executives. The government produced some of the Proulx materials before trial, including a summary of his FBI interview, but found and unseasonably produced additional material months later -- upon learning that Josleyn intended to call Proulx as a witness -- tending to show that Honda's Japanese managers had condoned the illegal activities in its sales division. Josleyn unsuccessfully moved to dismiss the indictment on due process grounds.

Given the specific discovery request for condonation evidence, the government plainly had an obligation to furnish Josleyn with the Proulx materials in a more timely fashion. See United States v. Sepulveda, 15 F.3d 1161, 1178 (1st Cir. 1993), cert. denied, 114 S. Ct. 2714 (1994) ; see also Fed. R. Crim. P. 16(a)(1)(C) (discovery relating to documents material to defense); 16(c) (continuing duty to disclose). Since the government

failed seasonably to disclose evidence "material to guilt or punishment," United States v. Devin, 918 F.2d 280, 289 (1st Cir. 1990) (citing Brady v. Maryland, 373 U.S. 83, 87 (1963)), which includes both exculpatory and impeachment evidence, we inquire whether as a consequence of the delayed disclosure defense counsel was unable to use the material "effectively in preparing and presenting the defendant's case." Id. (quoting United States v. Ingraldi, 793 F.2d 408, 411-12 (Ist Cir. 1986)). Due to its greater familiarity with the dynamics of the case, we will not reverse a district court's ruling on delayed disclosure unless it amounts to a demonstrable abuse of discretion. Id. We discern no abuse of discretion.

First, a principal concern in delayed disclosure cases -- whether the failure to supply the information in a seasonable fashion caused the defense to change its trial strategy, see id. at 290 -- is not significantly implicated in this case. Josleyn consistently pursued the same defense theory both before and after the Proulx materials were provided, by arguing that the Japanese managers at Honda had condoned the charged conduct. Secondly, even though the Proulx materials unquestionably provided additional support for the condonation "defense," we are not persuaded that the delay in disclosure adversely affected the defense in any important respect. In fact, while Cardiges was on the witness stand, Josleyn's counsel observed that "the government's file is like 100,000 pages or so." See also infra note 10. The defense took full advantage of the condonation evidence by using it in its own case, even before the tardily produced Proulx

materials were made available, then featured the government's delayed disclosure in its closing argument.[10]

On this record, we think the district court soundly concluded that the Proulx materials added little to the evidence previously produced by the government, and therefore its late disclosure had not impeded Josleyn's defense to a significant degree. See United States v. Catano, 65 F.3d 219, 227 (1st Cir. 1995) (noting cumulativeness of impeachment materials); Sepulveda, 15 F.3d at 1179 (holding that failure to produce "incremental information" caused no prejudice). We note as well that Josleyn makes no claim that the prosecutor intentionally delayed disclosure.

Furthermore, and by no means least importantly, the only relief Josleyn requested was the outright dismissal of the indictment. The district court has broad discretion to redress discovery violations in light of their seriousness and any prejudice occasioned the defendant.

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[10]Defense counsel argued in closing:

> When you ask [a witness] a question, when the question is asked [whether] you've gone through our files and there's nothing there to indicate that American Honda executives knew about these activities, or a question of that type, and there's tons of things, reams of things in that file, that's wrong. When the file isn't even complete because you have a memorandum from Mr. Proulx that you haven't turned over to the defense at all and don't get turned over till weeks later, well, isn't that question kind of a little bit false?

Osorio, 929 F.2d at 762-63; see also Fed. R. Crim. P. 16(d)(2) (authorizing district court to "permit the discovery or inspection, grant a continuance, or prohibit the party from introducing the evidence not disclosed, or . . . enter such other order as it deems just under the circumstances"). On the other hand, the draconian relief demanded by Josleyn was grossly disproportionate both to the prosecution's nonfeasance and any prejudice to the defense. See Bello-Perez, 977 F.2d at 670 (favoring continuance over dismissal); accord Devin, 918 F. 2d at 290-91. As Josleyn eschewed various alternative remedies more consonant with the government's culpability and any prejudice to the defense, see, e.g., Osorio, 929 F.2d at 762-63 (noting, as alternative remedies, recalling witness for additional cross-examination, affording defense greater leeway with witnesses, and instructing jury that government failed to meet discovery obligations), we find no abuse of discretion in refusing to dismiss the indictment.

5. Closing Argument

Josleyn claims that the lead prosecutor improperly vouched for the credibility of government witnesses, and Cardiges in particular, during rebuttal. Absent contemporaneous objection, we may notice only "plain error." United States v. Tuesta-Toro, 29 F.3d 771, 776-77 (Ist Cir. 1994), cert. denied, 115 S. Ct. 947 (1995); Fed. R. Crim. P. 52(b). Viewed in the context of the entire trial, United States v. Smith, 982 F.2d 681, 682 (1st Cir. 1993), the prosecutor's remarks, though plainly inappropriate, did not undermine the fundamental fairness

of Josleyn's trial. See United States v. Young, 470 U.S. 1, 16 (1985).

Although at times it may be difficult to distinguish improper vouching from zealous advocacy, there can be no doubt that the statements at issue here constituted improper rebuttal:

> Now there was a lot of suggestion of false play in this case. I want to say this. I'm a married person with a family, and I go home at night with a sound conscience. I have worked very hard on this case. Mr. Feith has worked very hard on this case. Mr. Mulvaney and Miss Roux have worked very hard on this case. And we are very proud of what we have done. We have done nothing to be ashamed of.[11]

Injecting the prosecutor's personal life and individual efforts into the decisional mix not only invited the jury to

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[11]Nor have we any doubt that defense counsel provoked the prosecution to these excesses. See United States v. Grabiec, __ F.3d __, __ (1st Cir. 1996) [No. 96-1131, slip op. at 4 (1st Cir. Sept. 25, 1996)]. Referring to Cardiges' testimony, Josleyn's counsel argued: "It's wrong to lie, and it's also wrong to help you lie; to ask them questions [when you know] that the answers are going to be untrue . . . . I call it disgusting." Later, he added: "You want to see mail fraud? Stick this indictment in the mail and you'll see a mail fraud." Josleyn's counsel made an improper appeal for jury nullification as well: "People aren't born and the Almighty says you may be a prosecutor. That's a right that's given by the people. It's a trust. And when it's abused, somebody's got to do something about it."

consider irrelevant matters beyond the record, but unfairly evoked jury sympathy and diverted attention from the relevant evidence. See United States v. Rosales, 19 F.3d 763, 767 (1st Cir. 1994) (prosecutor denied fabricating evidence against defendant).

There should be no need to remind federal prosecutors that they are not free to disregard the bounds of proper argument even in response to perceived provocation. See Young, 470 U.S. at 18-19. The important precept that the prosecutor may not vouch for the credibility of a government witness is deeply rooted in American law. See Rosales, 19 F.3d at 767 ("When the prosecutor places the credibility of counsel at issue, the advantage lies with the government . . . .") (citations omitted). Thus, a prosecutor may not lend the prestige of the government to buttress a witness, nor indicate to the jury that information known to the prosecutor, but not admitted in evidence, supports the government's theory of the case. Young, 470 U.S. at 18-19.

The appropriate response for the prosecutor in these circumstances is to lodge a contemporaneous objection and request an appropriate curative instruction. See id. at 13. Failing that, the prosecutor is constrained to a fair discussion of the evidence. But for the brief passage challenged on appeal, see supra p. 34, the prosecution adhered to the appropriate standard.

Under the "plain error" standard, appellants bear the burden of showing that the prosecutor's remarks resulted in prejudice, i.e., affected their substantial rights.

See United States v. Olano, 507 U.S. 725, 732-34 (1993). Even then, however, we will not notice error unless it caused "a miscarriage of justice" or seriously undermined "the integrity or public reputation of judicial proceedings." Id. We must consider the likely impact the prosecutor's remarks had on the jury in light of the entire record, including the closing argument presented by the defense. Young, 470 U.S. at 16-17.

Compared with defense counsel's attack against the integrity of the prosecuting attorneys throughout closing argument, see supra note 11, their rebuttal was moderate. See United States v. Oreto, 37 F.3d 739, 746 (1st Cir. 1994) (tolerating measured response to repeated attempts to magnify government misconduct), cert. denied, 115 S. Ct. 1161 (1995). In all events, the district court prudently countered the risk of serious residual prejudice by promptly cautioning the jury that counsel's arguments are not evidence, and directing the jury to base its verdicts solely on the evidence. See United States v. Mejia-Lozano, 829 F.2d 268, 274 (1st Cir. 1987). Given the overwhelming evidence against Josleyn, see supra Section II.B.3(b), the provocative excesses in the closing argument presented by his own counsel, and the timely jury instructions by the district court, the improper remarks by the prosecutor in rebuttal did not rise to the level of plain error. See Rosales, 19 F.3d at 767-68 (finding similar vouching harmless error).[12]

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[12]Citing United States v. DiLoreto, 888 F.2d 996, 999 (3d Cir. 1989), Josleyn suggests that prosecutorial vouching requires reversal per se. DiLoreto was not only inconsistent with First Circuit case law, it has been overruled. See United States v. Zehrbach, 47 F. 3d

D. The Billmyer Sentencing Claim

Billmyer challenges a two-level enhancement of his base offense level ("BOL") for abusing a position of private trust. See U.S.S.G. § 3B1.3 (1995). We review the § 3B1.3 ruling de novo. United States v. Tardiff, 969 F.2d 1283, 1289 (1st Cir. 1992). As Billmyer acknowledges a sound factual basis for the § 3B1.3 enhancement, we need only apply the pertinent guideline language.

> If the defendant abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense, increase by 2 levels. This adjustment may not be employed if an abuse of trust or skill is included in the base offense level or specific offense characteristic.

U.S.S.G. § 3B1.3 (Nov. 1995) (emphasis added).

1252, 1264-65 (3d Cir.) (en banc), cert. denied, 115 S. Ct. 1699 (1995). Furthermore, Josleyn's strongest authority, see United States v. Smith, 962 F.2d 923, 933-36 (9th Cir. 1992) (finding plain error), is readily distinguishable. There, defense counsel did not allege that the prosecutor either withheld evidence or suborned perjury, id. at 934; moreover, the prosecutor had invoked both the prestige of the government and the authority of the court in rebuttal, id. at 936; cf. United States v. Perez, 67 F.3d 1371, 1379 (9th Cir. 1995) (distinguishing Smith on latter ground).

The district court applied U.S.S.G. § 2B4.1 (commercial bribery) to determine Billmyer's BOL. As the specific offense characteristics listed in § 2B4.1(b) are not germane,[13] we must consider whether the BOL prescribed in § 2B4.1 "included" an abuse-of-trust component which would render the offense level enhancement invalid under the second sentence in § 3B1.3.

The Guidelines prohibit the sentencing court from imposing an abuse-of-trust enhancement in a public bribery case, see U.S.S.G. § 2C1.1, comment (n.3), unless special circumstances require reference to other offense

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[13]Section 2B4.1(b) provides:

> Specific Offense Characteristics
>
> (1) If the greater of the value of the bribe or the improper benefit conferred exceeded $2,000, increase the offense level by the corresponding number of levels from the table in §2F1.1 [offense - conduct guideline for fraud and deceit/forgery].
>
> (2) If the offense --
>
> (A) substantially jeopardizes the safety and soundness of a financial institution; or
>
> (B) affected a financial institution and the defendant derived more than $1,000,000 in gross receipts from the offense,
>
> increase by 4 levels. If the resulting offense level is less than 24, increase to level 24.

U.S.S.G. § 2B4.1(b).

guidelines, see id. § 2C1.1(c). Thus, in its main thrust the present challenge attempts to equate Billmyer's commercial bribery offense with bribery of a public official. According to Billmyer, the same general rule must apply because public bribery and private bribery are "virtually identical" offenses. We are not persuaded.

The absence of an explicit provision restricting the application of the abuse-of-trust enhancement in commercial bribery cases severely undercuts the analogy urged by Billmyer. See United States v. Newman, 982 F.2d 665, 673-74 (1st Cir. 1992) (applying expressio unius est exclusio alterius principle in this sentencing context), cert. denied, 510 U.S. 812 (1993). Furthermore, the Sentencing Commission took pains throughout the Guidelines to specify the circumstances in which courts should not impose enhancements for abuse of trust.[14] In sum, the overall structure of the Guidelines simply does not warrant the categorical ban advocated by Billmyer.

Moreover, not only does Billmyer cite no supporting case law, but our research discloses ample authority for imposing an abuse-of-trust enhancement in such a case. For example, in United States v. Butt, 955 F.2d 77 (1st Cir. 1992), the court provided clear explication of its rationale for upholding an abuse-of-trust

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[14]See, e.g., U.S.S.G. § 2A3.1(b)(3), comment. (n.4) (sexual abuse); id. § 2H1.1(b)(1), comment. (n.5) (violating civil rights) id. § 2P1.1(b)(1), comment. (n.3) (prison escape); id. § 2T1.4(b) (1), comment. (n.2) (aiding tax fraud); see also Newman, 982 F.2d at 673-74; cf. United States v. Wong, 3 F.3d 667, 670 (3d Cir. 1993) (noting Commission's awareness of potential for "double counting").

enhancement in the case of a police officer convicted on a RICO charge, even though the underlying racketeering activity included extortion under color of right.

> The base offense level prescribed by the guidelines for a particular crime presumably reflects, or "includes," those characteristics considered by Congress to inhere in the crime at issue. In the case of extortion under color of right, abuse of trust would be one such characteristic, since Congress could reasonably have determined that every act of extortion under color of right involves an abuse of public trust. Because the RICO statute, by contrast, can be violated in innumerable ways, there are, arguably, no offense characteristics common to all RICO offenses.

Id. at 89. The same holds true here.

Billmyer was convicted of mail fraud conspiracy in violation of 18 U.S.C. § 371. As not every mail fraud conspiracy involves an abuse of trust, we cannot conclude that the BOL for commercial bribery necessarily includes an abuse-of-trust element so as to preclude an enhancement pursuant to § 3B1.3. See United States v. Kummer, 89 F.3d 1536, 1546-47 (11th Cir. 1996) (rejecting similar argument under U.S.S.G. § 2E5.1 (bribe affecting employee benefit plan)); cf. United States v. Connell, 960 F.2d 191, 199 (1st Cir. 1992) (finding that BOL applicable

to currency reporting violations did not encompass stockbroker's special skill).[15]

United States v. Sinclair, 74 F.3d 753, 762-63 (7th Cir. 1996), likewise demonstrates that the commercial bribery guideline does not take into account an abuse of trust."[16] Sinclair, a bank officer, was convicted of accepting a bribe in violation of 18 U.S.C. § 215(a)(2), a crime that would seem almost invariably to entail an abuse of trust. Yet the court noted that the statute did not define a single crime, see id. § 215(a)(1) (prohibiting person from offering bribe to bank officer), and reasoned that it would be wrong to require that the briber, who did not necessarily breach a position of trust, receive the same sentence as the bank-officer recipient. Sinclair, 74 F.3d at 763. Similarly, we think Billmyer's greater culpability, relative to other defendants who need not necessarily have abused a position of trust in the course of a mail fraud conspiracy, entitled the district court to impose the § 3B1.3 adjustment in this case. Accordingly, we affirm the enhancement.

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[15]One reasonable explanation for the two-level difference between the BOL for private bribery, see U.S.S.G. § 2B4.1 (level 8), and public bribery, see U.S.S.G. § 2C1.1 (level 10), may lie in the fact that the Sentencing Commission factored the abuse-of-trust element into the BOL for public bribery only.

[16]Sinclair is the only case involving an abuse-of-trust enhancement under U.S.S.G. § 2B4.1. We note, however, that other courts commonly allow an abuse-of-trust enhancement in embezzlement cases under U.S.S.G. § 2B1.1. See, e.g., United States v. Broumas, 69 F.3d 1178, 1182 (D.C. Cir. 1995), cert. denied, 116 S. Ct. 1447 (1996).

III

CONCLUSION

Finding no reversible error, the district court judgments are affirmed.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 95-2147

UNITED STATES,
Appellee,

v.

JOHN W. BILLMYER,
Defendant, Appellant.

TORRUELLA, CHIEF JUDGE,
SELYA, CYR, BOUDIN AND LYNCH
Circuit Judges

ORDER OF COURT

Entered: November 4, 1996

All eligible judges having voted, the petition for rehearing and rehearing en banc is hereby DENIED.

By the Court:
WILLIAM H. NG, Clerk

By Mary E. O'Callaghan
Administrative Manager

Judge Stahl did not participate in this case.
(Messrs. Connolly, Feith, Long]

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

United States of America

v. Criminal No. 94-029-01, 04-JD

John W. Billmyer
Dennis R. Josleyn

ORDER

On June 1, 1995 the jury convicted defendants John Billmyer and Dennis Josleyn of count II, conspiracy to commit mail fraud. Josleyn was also convicted of the following offenses: count 1, RICO; count III, conspiracy to commit mail fraud; and count IV, mail fraud. Before the court are Billmyer's motion for judgment of acquittal under Fed. R. Crim. P. 29(c) or, in the alternative, for a now trial under Fed. R. Crim. P. 33 (document no. 429) Josleyn's motion for judgment of acquittal or a new trial (document no. 432); and Josleyn's second motion for a new trial and request for an order directing the attendance of a witness (document no. 441).

Discussion

I. Count II - Venue

Billmyer and Josleyn assert that they are entitled to a judgment of acquittal because venue was not proper

in the District Of New Hampshire for the conspiracy charged in Count II.[1] Billmyer asserts that the government failed to adduce evidence to link Pedersens conduct to Billmyer or to the overall count II conspiracy. See, e.g., Memorandum of Law in Support of Motion for Judgment of Acquittal or, Alternatively, for a New Trial ("Billmyer's Memorandum") at 1, 14-22 ("There was no proof at trial that Billmyer had any knowledge of what Pedersen was doing, much less that Billmyer approved of Pedersen's activities, was involved in them, or shared profits with Pedersen").

When faced with a motion for judgment of acquittal under Rule 29, the court must determine "whether the total evidence, including reasonable inferences, when put together is sufficient to warrant a jury to conclude that the defendant is guilty beyond a reasonable doubt." United States v. Doe, 921 F.2d 340, 343 (1st Cir. 1990) (quoting Dirring v. United States, 328 F.2d 512, 515 (1st Cir.), cert. denied, 377 U.S. 1003 (1964)). Following conviction, the court is required to preserve the jury's responsibility to weigh the evidence by considering "all of the evidence . . . in the light most favorable to the prosecution." Id. at 344 (quoting Jackson v. Virginia, 443 U.S. 307, 319 (1979) (emphasis in original)).

The First Circuit recently cautioned courts not to consider "each piece of evidence in isolation" when ruling on a Rule 29 motion, adding that "it is for the jury, not

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[1]Joselyn has adopted Billmyer's venue argument by reference.

the court, to choose between conflicting inferences." United States v. Olbres, No. 94-2123, 1995 WL 431143 at * 7 (1st Cir. July 26, 1995) (reinstating convictions following district court's entry of judgment of acquittal). The First Circuit reasoned that

> [u]nder the viewpoint principle, a jury charged with determining an accused's quilt or innocence is entitled to consider the evidence as a seamless whole. Jurors are not required to examine the evidence in isolation, for individual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts.

Id. (quotations omitted) (emphasis supplied).

The venue argument fails. As an initial matter, the court notes that the government was required to establish venue in New Hampshire by a preponderance of the evidence, a lighter burden of proof than that required for every other element of the crimes alleged.[2] Moreover,

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[2]The court gave the Jury the following venue instruction:

> Count II alleges that only one overt act occurred in New Hampshire. That overt act is found at paragraph 96(p) of the indictment and reads as follows:
>
> > In or about May, 1987, David Pedersen, an Assistant zone Manager for American Honda, and other American Honda employees, caused an Acura

the Rule 29 standard is deferential to the jury's verdict and, as such operates to the government's benefit. In both his brief and in oral argument, defense counsel

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dealership in Nashua, New Hampshire, to be awarded to an automobile dealer, who shall be referred to as Dealer G.

You may find that venue is proper in the district of New Hampshire only if you conclude that:

(1) In May 1987 David Pedersen was a member of the same conspiracy as the defendants;

(2) David Pedersen knowingly committed the above described overt act;

(3) the act was in furtherance of the conspiracy charged in count II; and

(4) the occurred in the state of New Hampshire.

The government has the burden of proving these facts set forth in paragraphs 1-4 above by the preponderance of the evidence rather than by the higher standard, beyond a reasonable doubt. When I use the phrase "preponderance of the evidence," I mean that the government must prove that it is more probably so than not that the act occurred and occurred in New Hampshire. Your determination of whether venue is proper in the district of New Hampshire is the determination you will make in count II under the preponderance of the evidence standard. All other determinations must be made according to the higher, "beyond a reasonable doubt" standard.

Because the overt act found at paragraph 96(p) is the only overt act alleged to have occurred in New Hampshire, you must find that this act occurred in order to find either defendant guilty under count II. If you do not find by the preponderance of the evidence that this act occurred in New Hampshire, you must find both defendants not guilty.

United States v. Billmyer and Josleyn, Cr. 94-29-01, 04-JD, Jury Instructions at 46-47.

carefully digests the trial testimony, emphasizing the absence of a direct evidentiary link between Pedersen's and Bohlander's conduct relative to the Nashua LOI and other acts committed in furtherance of the count II conspiracy. In essence, Billmyer's argument invites the court to engage in a piecemeal dissection of the factual record in a manner similar to that rejected by the First Circuit in United States v. Olbres and the cases cited therein. Based on its application of the Rule 29 standard, the court finds that the evidentiary record, when viewed as a seamless whole and taken in a light most favorable to the government, supports the jury's finding by a preponderancy of the evidence that the overt act charged in paragraph 96(p) of the second superseding indictment occurred as alleged.

II. Multiple Conspiracies

A. Count II

Billmyer and Josleyn assert that they are entitled to a judgment of acquittal on Count II or, in the alternative, a new trial under Rule 33, because the evidence established multiple conspiracies and not the single conspiracy charged in the second superseding indictment.[3]

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[3]Billmyer's multiple conspiracy argument is advanced in support of his motion for a new trial. Josleyn, who has adopted Billmyer's legal argument and memoranda by reference, advances the multiple conspiracies argument in support of his motion for Judgment of acquittal and his motion for a new trial.

The First Circuit does not employ a "mechanical test through which a reviewing court can plumb the scope and contours of a given conspiracy or determine how many conspiracies may be said to exist." United States v. David, 940 F.2d 722, 734 (1st Cir.), cert. denied, 502 U.S. 989 (1991). Rather, the question of whether a conspiracy is multiple or single is one of fact which focuses on the "totality of the evidence and the permissible inferences therefrom." Id. at 732-34. In United States v. Cloutier, a drug case, the First Circuit announced several factors to be considered when making this fact-based determination. 966 F.2d 24, 28 (1st Cir. 1992).

> We consider: 1) when the drug [or other illegal) activity occurred; 2) the locations of the drug for other illegal activity; 3) the identities of the persons involved; 4) the co-conspirators' ends; 5) the means used to achieve those ends; and 6) the similarities (or differences) in the evidence used to prove the two conspiracies.

Id. at 28.

As counsel for Billmyer acknowledged in oral arguments the multiple conspiracies argument is analytically similar to his Rule 29 venue argument to the extent that both rest on the view that, as a matter of law, the conduct charged as an overall conspiracy actually encompassed numerous independent and disconnected schemes or patterns of conduct. Indeed, both defense counsel and counsel for the government argued that

application of the Cloutier factors to the factual record reveals the existence of multiple or single conspiracies, respectively.

The defense requested a jury instruction on multiple conspiracies and a detailed instruction on this issue was given to the jury.[4] This instruction directed the

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[4]The court gave the following multiple conspiracy instruction:

In this case, the defendants contend that the government's proof fails to show the existence of only one overall conspiracy. Rather, they claim that there were actually several separate and independent conspiracies with various groups of members.

Whether there existed a single unlawful agreement, or. many such agreements, or indeed, no agreement at all, is a question of fact for you, the jury, to determine in accordance with these instructions.

When two or more people join together to further one common unlawful design, purpose, or overall plan, a single conspiracy exists. On the other hand, multiple conspiracies exist when there are separate unlawful agreements to achieve distinct purposes.

You may find that there was a single conspiracy despite the fact that there were changes in personnel. by the termination, withdrawal, additions of new members, or in activities, or both, so long as you find that some of the co-conspirators continued to act for the entire duration of the conspiracy for the purpose charged in the indictment. The fact that the members of a conspiracy are not always identical does not necessarily imply that separate conspiracies exist. It is not necessary that you find that the alleged coconspirators joined the conspiracy at the same time or shared the same knowledge beyond their understanding, tacit or otherwise, that their illicit agreement existed. Nor do the participants in a conspiracy need to have known all of their co-conspirators or to have participated at the same time in furtherance of their criminal venture. What is essential is that the criminal goal or overall plan have persisted without fundamental alteration notwithstanding variations in personnel and their roles.

jury to acquit the defendants if it determined that the government failed to prove beyond a reasonable doubt the

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In determining whether there was a single conspiracy or multiple conspiracies you may consider a wide range of factors such as: whether there was a common goal; the nature of the scheme; overlapping of participants in various dealings; the nature, design, implementation, and logistics of the illegal activity; the participants, method of operation; the relevant geography; and the scope of co-conspirator involvement.

If the goal or overall plan of a conspiracy is to embrace multiple crimes, then each' conspirator must have knowledge or foresight of the conspiracy's multiplicity of objectives. If an individual agrees with others simply to commit a single crime and has no knowledge or foresight of the conspiracy's broader scope, that person is a member only of the narrower, one-crime conspiracy. Therefore, you must determine if the government has proven beyond a reasonable doubt that those individuals whom it alleges were 'members of the conspiracy charged in count II had knowledge or foresight of the conspiracy's broader scope. If not, you must acquit the defendants.

If you find that the conspiracy charged in the indictment did not exist, you cannot find any defendant guilty of the single conspiracy charged in the indictment. This is so even if you find that some conspiracy other than the one charged in this indictment existed, even though the purposes of both conspiracies may have been the same and even though there may have been some overlap in membership. If you find that there was not one conspiracy as charged in the indictment but one or more separate and independent conspiracies, then you must find the defendants not guilty.

Similarly, if you find that a particular defendant was a member of another conspiracy, and not the one charged in the indictment, then you must find that defendant not guilty of the conspiracy charged.

Therefore, what you must do is determine whether the conspiracy charged in the indictment existed if it did, you then must determine who were its members.

United States v. Billmyer and Josleyn, Jury Instructions at 39-42.

existence of a single Count II conspiracy. See United States v. Billmyer and Josleyn, jury instructions at 39-42. The government introduced a considerable quantum of evidence relating to Count II. The evidence, viewed as a seamless whole and taken in a light most favorable to the government, included facts which could reasonably support a finding of a single conspiracy based on an application of the Cloutier criteria. See 966 F.2d at 24. Specifically, the government adduced evidence which reasonably supports, inter alia, findings of an interrelated group of conspirators who employed the same or similar methods and means to achieve the common goal of personal financial gain. Although the court acknowledges that some of the evidence, such as Cardiges' failure to include Pedersen in a list of co-conspirators, may also support a finding of multiple conspiracies, see United States v. Ocampo, 964 F.2d 80, 83 (1st Cir. 1992), the court neither weighs the evidence nor chooses between conflicting inferences when ruling on a Rule 29 motion. See, e.g. United States v. Olbres, 1995 WL 431143 * 7.[5] Rather, based on its application of the appropriate standard of review, the court concludes that the factual record supports the jury's finding beyond a reasonable doubt that the single conspiracy charged in count II of the second superseding indictment existed.

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[5]Likewise, although the evidence concerning Pedersen's efforts to conceal his unlawful conduct from other co-conspirators may manifest an intent not to join a common enterprise, such testimony is also consistent with the government's theory that silence was a shared method and means of the conspiracy.

The multiple conspiracies argument is no more effective when advanced in support of the motions for a new trial under Rule 33. The court "may grant a new trial . . . if required in the interest of justice." Fed. R. Cr. P. 33. In the First Circuit, a "motion for a new trial is directed to the sound discretion of the trial court. Denial of such a motion will not be reversed, absent a miscarriage of justice or unless the evidence heavily preponderates against the verdict." United States v. Thornley, 707 F.2d 622, 626 (1st Cir. 1983) (citing United States v. Leach, 427 F.2d 1107, 1111 (1st Cir.), cert. denied, 400 U.S. 829 (1970)).

The multiple conspiracies argument was a fact-intensive defense skillfully presented to the jury along with an appropriate instruction concerning the applicable law. The court has determined, supra, that the factual record supports, rather than preponderates against, the jury's finding beyond a reasonable doubt that the single conspiracy alleged in count II existed. Accordingly, the defendants have failed to present sufficient justification for the court to find that the interest of justice requires a new trial.

B. Counts I and III

Josleyn asserts that he is entitled to a judgment of acquittal on counts I and III because "the evidence is insufficient to establish that the conspiracies charged in Counts I . . . and III of the indictment were single conspiracies." In support of the motion Josleyn relies

principally on Billmyer's legal argument and memoranda even though Billmyer was not indicted on these counts.

The Rule 29 motion on Count I lacks support in either fact or law. Count I of the second superseding indictment did not allege a conspiracy and, as such, the jury was never required to find the existence of a single conspiracy in order to convict. Rather, count I alleged a substantive violation of the RICO statute. However, to the extent the motion is based on the government's failure to prove one of the five RICO elements, which could include the failure to prove one of the three elements of the predicate acts of mail fraud, the court denies the motion based on a consideration of the entire factual record in accordance with the appropriate Rule 29 standard. See e.g. United States v. Olbres, 1995 WL 431143 at * 7.

The Rule 29 motion addressed to Count III based on the existence of multiple conspiracies also fails. The conspiracy alleged in Count III was not nearly as broad in scope, participants, or time as that alleged in count II. As charged, the Count III conspiracy embraced the conduct of Josleyn, Cardiges, and others relative to the direct mail advertising scheme and the sales training seminar ("STT") scheme from in or about 1989 until in or about June 1992. The factual record, viewed as a seamless whole and taken in a light most favorable to the government, included evidence which could reasonably support a finding of a single conspiracy based on application of the Cloutier criteria. See 966 F.2d at 24. Specifically, the government adduced evidence which supports, inter alia, findings of an

interrelated group of conspirators who employed the same or similar methods and means to achieve the common goal of personal financial gain. The court notes that Cardiges testified over the course of several days concerning his, Josleyn's, and Gary & Associates' direct involvement in both the advertising and the STT schemes. The fact that the same conduct also may be viewed as comprising two separate conspiracies perpetrated by similar means and participants, i.e., one conspiracy involving the ad campaign and the other involving STT, does not require entry of a judgment of acquittal because the court neither weighs the evidence nor chooses between conflicting inferences when ruling on a Rule 29 motion. See e.g., United States v. Olbres, 1995 WL 431143 at * 7. Rather, based on its application of the appropriate standard of review, the court concludes that the factual record supports the Jury's finding beyond a reasonable doubt that the single conspiracy charged in Count III existed.

III. Misjoinder and Co-Conspirator Hearsay

Billmyer asserts that he is entitled to a new trial because of the misjoinder of count II with the other counts charged in the second superseding indictment. Billmyer also asserts that he is entitled to a new trial because of the erroneous admission of hearsay testimony of co-conspirators. Josleyn again has adopted his co-defendant's legal argument and memoranda by reference.

Both the misjoinder argument and the hearsay argument rest in large part on the defendants' theory that the evidence related to count II established the existence of multiple conspiracies. Thus, as an initial matter the arguments are imperiled by the court's conclusion, supra, that the factual record supports the jury's finding beyond a reasonable doubt that the single conspiracy charged in count II existed. Indeed, Billmyer tacitly acknowledges that the existence of a single conspiracy vitiates the misjoinder argument by noting that "joinder may be proper in the presence of an over-arching conspiracy." Billmyer's Memorandum at 24 (citing United States v. Boylan, 898 F.2d 230, 245 (1st Cir.), cert. denied, 498 U.S. 849 (1990). Likewise, with regard to the admission of the hearsay statements of coconspirators, Billmyer notes that

> if it is more likely than not that the declarant and the defendant were members of a conspiracy when the hearsay statement was made, and that the statement was in furtherance of the conspiracy, the hearsay is admissible.

Id. (quoting United States v. Petrozziello, 548 F.2d 20, 23 (1st Cir. 1977)).

The court's analysis of the intimate relationship between the multiple conspiracies theory and the misjoinder and coconspirator hearsay arguments does not in itself dispose of the instant motions under Rule 33. Rather, the court further notes that the defendants did not suffer the level of prejudice that would require a new

trial in the interest of justice. The jury was instructed to consider each count and each defendant separately. See United States v. Billmyer and Josleyn, Jury Instructions at 14-15. Likewise, the jury was instructed that they could not consider the inculpatory acts and statements of co-conspirators without first concluding that the acts or conduct were made by members of the conspiracy in furtherance of the conspiracy. See id. at 48-49. In addition, counsel for both the government and for the defendants segregated the evidence to avoid prejudicial spillover from defendant to defendant and from count to count. Where appropriate, exhibits were identified so as to remind the jury against which defendant they were to be considered. In addition, instructions were given to the jury from time to time during the trial to consider certain testimony only as to one defendant or the other. In light of the above, the court finds that the defendants are not entitled to a new trial under Rule 33.

IV. Newly Discovered Evidence

Josleyn asserts that he is entitled to a new trial because evidence discovered following his conviction, if presented to the jury, would have resulted in acquittal. He argues that prosecution witness Robert Rivers' trial testimony directly contradicted testimony Rivers provided in "another proceeding when it so served his interest."[6]

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[6]Josleyn asserts that Rivers contradicted his trial testimony by stating in a sworn affidavit that

> I obtained ownership interest in a number of Honda dealerships [sic] It (sic) clear to me was my belief

Josleyn reasons that this evidence would have had a tremendous negative effect on Rivers credibility and, in turn, "upon the jury's view of the credibility of other governmental witnesses who parroted the perjury of Rivers."

In the First Circuit, for a defendant to prevail on a motion for a new trial based upon newly discovered evidence, four elements must be satisfied:

> 1) the evidence was unknown or unavailable to defendant at the time of trial;
>
> 2) the failure to discover the evidence was not due to a lack of diligence on the part of defendant;
>
> 3) the new evidence must be material; and
>
> 4) the evidence would probably produce an acquittal upon retrial of defendant.

United States v. Ortiz, 23 F.3d 21, 27 (1st Cir. 1994) (citing United States v. Benavente Gomez, 921 F.2d 378, 382 (1st Cir. 1990); United States v. Wright, 625 F.2d 1017, 1019 (1st Cir. 1980)). In the context of a motion for

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> that Honda's Presidents, Chino, Munekuni, and Mr. Amemyia were cognizant of the improper activities which were occurring within American Honda Sales force.

Josleyn's Supplement to Motion for Judgment of Acquittal or Alternatively Motion for New Trial at 4.

a new trial, impeachment evidence or cumulative evidence generally is not considered material for purposes of the third element. E.g., Barrett v. United States, 965 F.2d. 1164, 1195 (1st Cir. 1992) (listing cases). The court must deny the motion for a new trial if any one of these four elements is lacking. Id. (citing United States v. Natanel, 938 F.2d 302, 313 (1st Cir. 1991), cert. denied, 112 S. Ct. 986 (1992)).

The post-conviction discovery of the Rivers affidavits containing certain apparently inconsistent testimony does not warrant a new trial. First, Rivers testified at length during trial and, to the extent the defense was aware that Rivers had testified on other occasions, it had the opportunity to elicit inconsistencies based on the prior testimony. Likewise, to the extent the defense was not aware that Rivers had testified on other occasions, such as in the affidavit at issue, the existence of such prior testimony itself could have been elicited through diligent cross-examination.

Second, even without knowledge of Rivers' inconsistent testimony in other proceedings, the defense repeatedly elicited testimony from other witnesses, such as Cecil Proulx and David Power, concerning Japanese management's knowledge of wrongful conduct. Accordingly, Josleyn's bald assertion that additional, and most likely cumulative, testimony on this point would have caused the jury to adopt the defense theory of the case is unavailing.

Third, although Rivers was an important government witness, the jury convicted Josleyn after listening to and gauging the credibility of countless other witnesses during a lengthy trial. Thus, Josleyn strains reason to suggest now that a different verdict would have resulted had the jury found Rivers to be a less credible witness, particularly in view of the overwhelming evidence of Josleyn's guilt.

Fourth, the motion claims that the newly discovered evidence is exculpatory in that it would have undermined Rivers' credibility. Impeachment evidence is not considered material for purposes of determining whether to grant a motion for a new trial.

V. Prosecutorial Misconduct

Josleyn next asserts that he is entitled to a new trial because various instances of prosecutorial misconduct have violated his constitutional right to due process. Josleyn asserts the government wrongfully:

> (1) elicited false testimony from Cardiges that Cardiges had personally reviewed all government files and, in the course of this review, found nothing to implicate Japanese management or to suggest that Japanese management knew of or condoned wrongful conduct;
>
> (2) failed to retract the testimony or "inform the jury that it had previously adduced false testimony"; and

(3) exacerbated the affect of Cardiges' false testimony by personally vouching for "the propriety of the question and answer" during rebuttal argument.[7]

The court considers several factors when determining whether instances of prosecutorial misconduct have "so poisoned the well that a new trial is required." United States v. Manning, 23 F.3d 570, 574 (1st Cir. 1994) (quotations omitted). They are:

(1) The severity of the misconduct;

(2) the context in which it occurred;

(3) whether the judge gave any curative instructions and the likely effect of such instructions; and

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[7]Inexplicably, Josleyn has failed to identify which portions of the prosecutor's rebuttal he argues constituted an error of constitutional dimension. Based on its own review of the transcript, the court believes that Josleyn is objecting to the following remarks of Attorney Connolly:

> Now, there was a lot of suggestions of foul play in this case. I want to say this. I'm a married person with a family, and I go home at night with a sound conscience. I have worked very hard on this case, Mr. Feith has worked very hard on this case. Mr. Mulvaney and Ms. Roux have worked very hard on this case. And we are very proud of what we have done. We have nothing to be ashamed of.

Trial Transcript, May 18, 1995, afternoon session at 83.

(4) the strength of the evidence against the defendant.

Id. (citing cases). In general, prosecutors may neither vouch for their witnesses nor appeal to the jury to act in a manner other than as a dispassionate arbiter of the facts. Id. at 573 (citation omitted). On appeal, the First Circuit reviews a prosecutor's allegedly improper closing argument for plain error if the defense failed to interpose a contemporaneous objection to the commentary. United States v. Ortiz, 23 F.3d at 26.

The allegations of prosecutorial misconduct do not warrant a new trial. First, the court promptly addressed concerns over Cardiges' inaccurate or misleading testimony when those concerns were voiced by counsel at sidebar during re-cross examination. The court found that the government's examination of Cardiges constituted "misleading question and answering" which left the jury with the impression that the governments files did not contain materials suggestive of Japanese management's knowledge of wrongful conduct. Trial Transcript, April 6, 1995, morning session at 117, 121-23. The court undertook to cure the misimpression -- over the government's strenuous objection -- by permitting counsel for Josleyn to use hearsay material during his cross examination of Cardiges. See id. at 124-30; Trial Transcript, April 6, 1995, afternoon session at 3-18. Defense counsel took full advantage of its opportunity to cross examine Cardiges and, in particular, enjoyed considerable latitude when questioning him on his prior testimony concerning the contents of the government's

files. See Trial Transcript, April 6, 1995, afternoon session at 18-50.

Second, Cardiges' credibility was further compromised by Cecil Proulx's testimony that he personally submitted to the government written materials, including copies of correspondence and memoranda, concerning Japanese management's knowledge of conduct violative of company policy.

Third, the defense emphasized the government's misleading examination of Cardiges during its closing argument. In this sense, the defense effectively co-opted potentially prejudicial testimony to its own advantage.

Fourth, Josleyn was convicted by a jury which considered many weeks of incriminating testimony and boxes of exhibits. This volume of evidence invariably mitigates whatever prejudicial taint arose from the government's line of questioning of any one cooperating witness.

Fifth, Connolly's statement in rebuttal did not create undue prejudice. Connolly should not have made the objectionable remarks. They were improper to the extent that Connolly commented on the government's probity in trying the case. The comment may have tended to bolster the government's credibility in a very generalized way and, also in a generalized way, may have bolstered the credibility of government witnesses. Nonetheless, Connolly neither directly vouched for the veracity of the government's witnesses, nor made

statements of the sort generally considered to prejudice the defense in any appreciable way, i.e., no burden shifting, no misstatements of fact or law, no allusions to evidence not admitted at trial, and no inflammatory arguments concerning the role of the jury.

Finally, the defendant failed to make a contemporaneous objection to the comment.[8] An objection would have alerted the court to the perceived problem and would have allowed the court the opportunity to take curative action.

Having weighed and considered the defendant's assertions of prosecutorial misconduct, and having considered the overwhelming weight of evidence introduced against Josleyn, the court finds that any prejudice was not undue and did not create the level of unfairness necessary to require a new trial.

Conclusion

For the foregoing reasons, Billmyer's motion for judgment of acquittal under Fed. R. Crim. P. 29(c) or, in the alternative for a new trial under Fed. R. Crim. P. 33 (document no. 429); Josleyn's motion for Judgment of

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[8]Josleyn's failure to object to the statements he now asserts require a new trial is particularly conspicuous given the defense's appropriate and timely objections to other commentary made during the course of the government's closing remarks, i.e., objections made to statements concerning the redaction of materials contained in the Sherry Cameron legal file. See Trial Transcript, May 18, 1995, afternoon session at 87-88.

acquittal or a new trial (document no. 432); and Josleyn's second motion for a new trial and request for an order directing the attendance of a witness (document no. 441) are denied.

SO ORDERED.

Joseph A. DiClerico, Jr.
Chief Judge

September 26, 1995

cc: David W. Long, Esquire
Paul J. Twomey, Esquire
U.S. Attorney
U.S. Probation
U.S. Marshal